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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 348 104.

JOHN E. ROLLER, PLAINTIFF IN ERROR,

vs.

STEPHEN HOLLY, WILLIAM HOLLY, JOSEPH PEOPLES, ET AL.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED JULY 20, 1896.

(16,933.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1899.

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1 & 2 Caption.

Be it remembered that at a regular term of the honorable court of civil appeals in and for the fourth supreme judicial district of Texas, at San Antonio, the following case came on for determination, to wit:

JOHN E. ROLLER, Appellant,
vs.
STEPHEN HOLLEY ET AL., Appellees.

Appealed from the district court of Limestone county.

3 Caption.

THE STATE OF TEXAS,
County of Limestone.

At a term of the district court begun and holden at Groesbeck, within and for the county of Limestone, before the Hon. Rufus Hardy, and ending on the 8th day of February, A. D. 1895, the following case came on for trial, to wit:

JOHN E. ROLLER, Plaintiff,
vs.
STEPHEN HOLLEY ET AL., Defendants. } No. 2647.

Plaintiff's First Amended Original Petition.

Filed January 23, 1895.

In District Court of Limestone County, January Term, 1895.

JOHN E. ROLLER
vs.
STEPHEN HOLLEY ET ALS. } No. 2647.

And now comes the plaintiff in the cause stated and numbered as above, by his attorney, and, leave of the court first had and obtained, filed this his first amended original petition in lieu of his original petition filed July 14, 1894.

The plaintiff, John E. Roller, who resides in the county of Rockingham and State of Virginia, complaining of Stephen Holly, William Holly, Joseph Peoples, H. W. Williams, and W. T. Jackson, respectfully shows to the court that the defendants reside in the county of Limestone and State of Texas; that heretofore, to wit, on the — day of January, 1890, the defendants Stephen Holly and William Holly executed and delivered to plaintiff their certain promissory notes in writing for ($228) two hundred and twenty-eight dollars each and payable to the order of plaintiff, and to become due on the 1st day of January, 1891; January 1st, 1892; January 1st, 1893; January 1st, 1894, and January

1st, 1895, respectively, and bearing ten per cent. per annum
4 interest each; the note to become due January 1, 1891, bears interest from maturity, and the other notes bear interest from the 1st day of January, 1891, interest payable annually on the 1st day of January of each year until said notes should be paid in full; that said notes were given for the unpaid purchase-money on 114 acres of land, part of the James Gillespie and Peterson Pate surveys, situated in said Limestone county, Texas, and purchased by the said Stephen and William Holly from plaintiff, and is bounded as follows: Beginning at a point on James Gillespie's south line 520 vrs. from his southeast corner, thence south 60 west 301 vrs. to a stake; thence north 35½ west 46 vrs. to a stake; thence south 77¾ west 360 vrs. to a stake, whence a P. O. 10 in. in dia. brs. N. 77¾ E. 154⅔ vrs.; thence S. 16 E. 156 vrs. to a stake in Gillespie's S. line; thence S. 60 W. 349 vrs., P. O. marked for corner tree; thence S. 72 E. 1,550 vrs. to a stake; thence N. 30 W. 1,155 vrs. to the beginning; and the defendants herein are notified to produce on the trial of this cause their memorandum or deed of conveyance executed by plaintiff to said defendants, Stephen and William Holly, to said land; that said notes are now due—one of them, to wit, the last one described, matured on the 1st day of January, 1895—and are unpaid, and defendants, though often requested so to do, have hitherto failed and refused and still fail and refuse to pay the same or any part thereof, and plaintiff is now the legal owner and holder of said notes.

Plaintiff further shows to the court that the defendants Joseph Peoples, H. W. Williams, and W. T. Jackson claim to be the owners of said land, and are asserting an interest therein antagonistic to plaintiff's said claim, the nature of which claim is to the plaintiff unknown.

Wherefore plaintiff prays that the defendants be cited to answer this petition; that he have judgment against said Stephen and William Holley for his debt and interest and a foreclosure of his vendor's lien on said land as against all the defendants, for costs of suit and general relief, legal and equitable.

THOS. J. GIBSON,
KIMBELL BROS. & BLACKMON,
Attorneys for Plaintiff.

Filed Jan. 23, 1895.

A. J. HARPER,
C. D. C., L. Co., Tex.

5 *Citation.*

Filed 7, 21, 1895.

The State of Texas to the sheriff or any constable of Limestone county, Greeting:

You are hereby commanded to summon Stephen Holley, William Holley, Joseph Peoples, H. W. Williams, and W. T. Jackson to be and appear before the honorable district court of Limestone county, Texas, at the next regular term thereof to be holden at the courthouse, in Groesbeck, on the first Monday in August, 1894, then and

there to answer the plaintiff's petition filed in a suit in said court on the 14th day of July, 1894, wherein John E. Roller is plaintiff and Stephen Holley, William Holley, Joseph Peoples, H. W. Williams, and W. T. Jackson are defendants, file number of said suit being No. 2647.

The nature of plaintiff's demand is as follows, to wit: Suit upon five certain promissory notes executed by defendants Stephen Holley and William Holley for the sum of $228.00 each, and to become due on the 1st day of January, 1891, Jan. 1st, 1892, Jan. 1st, 1893, Jan. 1st, 1894, and Jan. 1st, 1895, and each bearing 10% interest per annum, the note to become due Jan. 1st, 1891, bearing interest from maturity and the other notes bear interest from the 1st day of Jan., 1891, with interest payable annually. Said notes were given for the unpaid purchase-money of 114 acres of land in Limestone county, Texas, being a part of the James Gillespie and Peterson Pate surveys, and deeded by plaintiff to said Stephen Holley and William Holley. Said def'ts are given notice to produce on the trial of this cause the memorandum or deed of conveyance executed by plaintiff to them. Plaintiff represents that defendants Joseph Peoples, H. W. Williams, and W. T. Jackson claim to be the owners of said land and are asserting an interest therein antagonistic to plaintiff's said lien. Plaintiff prays that he have judgment against said Stephen and William Holley for his debt and interest and a foreclosure of his vendor's lien as against all the defendants, for costs of suit, &c., and you will deliver to said defendants, Stephen Holley, William Holley, Joseph Peoples, H. W. Williams, and W. T. Jackson, each in person, a true copy of this citation.

Herein fail not, but have you before said court on the first day of the next term thereof this writ, with your return thereon showing how you have executed the same.

6 Attest A. J. Harper, clerk of the district court of Limestone county.

[L. S.] Given under my hand and the seal of said court, at office, in Groesbeck, in the county of Limestone, this 14th day of July, 1894.

A. J. HARPER,
Clerk District Court, Limestone County, Texas.

Sheriff's Return.

Came to hand the 15 day of July, 1894, at 10 o'clock a. m., and executed the 20 day of July, 1894, by delivering to Stephen Holley, William Holley, Joseph Peoples, H. W. Williams, and W. T. Jackson, the within-named defendants, each in person, a true copy of this citation.

J. B. GRESHAM,
Sheriff Limestone County, Texas,
By A. F. ANGLIN, *Deputy.*

Fees.

Serving 5 copies	$7.50
Mileage, 50	2.50
Total	$10.00

Citation endorsed: No. 2647. District court, Limestone county August term, 1894. Citation. John E. Roller *vs.* Stephen Holley *et al.* Issued 14 day of July, 1894. A. J. Harper, district clerk. Filed July 21, 1895. A. J. Harper, district clerk.

Defendants' First Amended Original Answer.

Filed 1, 5, 1895.

J. E. ROLLER *vs.* STEPHEN HOLLY ET AL. } No. 2647. Suit Pending in the District Court of Limestone County, August Term, 1894.

7 Now comes the defendants H. W. Williams, Joe Peoples, and W. T. Jackson, and by leave of the court first had and obtained files this their amended original answer in lieu of their original answer filed herein on August —, 1894, and for answer herein defendants deny each and every allegation contained in plaintiff's original petition and say they are not guilty of the wrongs and trespasses therein contained.

And, answering specially herein, defendants show that on the 3rd day of January, 1887, plaintiff, J. E. Roller, purchased the land in controversy from John W. and Cora E. Jordan, giving as part payment therefor his promissory note for the sum of $216.17, due on the first day of Nov., 1890, bearing 10% interest from date, which deed and note retained a vendor's lien on said land; that before the maturity of said note McClintic and Proctor became the purchasers thereof, and on the — day of ——, 1890, instituted suit in the district court of Limestone county for the balance due on said note, with a foreclosure of the vendor's lien on said land, and after due service being had on Jan'y 9th, 1891, recovered judgment against J. E. Roller for the sum of $276.65, with 10% interest thereon from date, together with all costs, with a foreclosure of vendor's lien on the land described in plaintiff's petition, which is the same land here sued for; that in suit of McClintic & Proctor *vs.* J. E. Roller there was incurred $8.75 costs, and $14.25 costs incurred by the sale of said land; that in accordance with the judgment on Jan'y 30, 1891, an order of sale wrs issued out of the district court of Limestone county and placed in the hands of R. M. Love, sheriff of Limestone county, commanding him to seize and sell said land, who advertised said land for sale as required by law on the first Tuesday in March, 1891, it being March 3rd, 1891; sold said land to the highest bidder, for cash, and said land was struck off to H. W. Williams for the sum of $300.00, which sum was paid over to R. M. Love, sheriff of Limestone county; that while the bid was made

by H. W. Williams and deed taken in his name, yet it was bought for the joint benefit of H. W. Williams and W. T. Jackson, and they each paid one-half the purchase-money; that the said Williams, acting for himself and said Jackson, on the 4th day of May, 1891, sold said land to defendant Joe Peoples, giving him a warranty deed therefor. Defendants pray that in the event the plaintiff recover in this proceeding the land as against these defendants
8 that they recover of and from the plaintiff the $300.00 paid for said land, and that the same be decreed a lien on said —, and they will ever pray.

FARRAR, KINCAID & WILLIAMS,
COBB & JACKSON,
Attorneys for Defendants.

Filed Jan. 15, 1895.
A. J. HARPER,
C. D. C., L. Co., Tex.

Plaintiff's First Supplemental Petition

Filed 1, 23, 1895.

In District Court of Limestone County, January Term, 1895.

JOHN E. ROLLER
vs.
STEPHEN HOLLY ET ALS. } No. 2647.

And now comes the plaintiff in the cause stated and numbered as above, by his attorney, and, under leave of the court first had and obtained, filed this his first supplemental petition by way of replication to the first amended original answer of defendants Jackson, Williams, and Peoples, filed herein January 15th, 1895, and demurs, excepts, and answers as follows:

First.

The plaintiff demurs to the legal sufficiency of said amended answer and says the same presents no valid defense to plaintiff's right of recovery, and of this he prays judgment of the court.

Second.

And for special exception thereto plaintiff says that said answer is too vague, uncertain, and indefinite, because the same does not show with sufficient certainty the manner and character of service had on plaintiff in the alleged suit of McClintic & Proctor against him, and does not show with sufficient certainty also against whom said suit for foreclosure was instituted and who were made parties plaintiff and defendant respective- therein.

THOS. J. GIBSON,
Att'y for Plaintiff.

9 Third.

And for answer thereto plaintiff denies all and singular the allegations contained in said amended answer, and of this he puts

himself on the country and prays judgment as in his original petition.

Fourth.

And for special answer thereto plaintiff avers that at the time of the institution of the alleged suit of McClintic & Procter against him, to wit, on the 24th day of December, 1890, he was and has ever since been a citizen of the State of Virginia, and was not then nor has he ever been a citizen of the State of Texas, nor has he ever had his residence or domicile in the State of Texas, but was on said 24th day of December, 1890, and has ever since been a resident of the county of Rockingham and State of Virginia; that prior to the institution of said suit, to wit, on the — day of January, 1890, he sold and conveyed, under a written contract signed by him, the tract of land in the said petition mentioned and described to Stephen and William Holly for the purchase price set forth in said petition and sued for therein and put them in possession of same, and they were in such possession at the time of the institution of said suit of McClintic & Procter *vs.* John E. Roller, and had been since the preceding January as such vendees, and yet neither they nor John W. Jordan were made parties to said suit; and plaintiff avers that such pretended judgment alleged to have been obtained against him on January 9th, 1891, at the suit of McClintic & Procter, is null and void as against him because the said district court of Limestone county, Texas, never acquired jurisdiction over him nor over the property in controversy in the suit, and the said judgment was not obtained nor was the sale under said judgment of said lands made and obtained by due process of law, but the same were in contravention of the 14th amendment of the Constitution of the United States as follows, to wit:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction *of* the equal protection of the laws." Because:

1. Service of process on plaintiff, who was sole defendant in said suit of McClintic & Procter *vs.* John E. Roller, was obtained without the jurisdictional limits of the State of Texas, and plaintiff was at the time of the service of said process a non-resident of the State of Texas and a resident of the county of Rockingha n, in the State of Virginia.

2. No writ of attachment or other writ was levied on the land in controversy at the time of the institution of said suit of McClintic & Proctor *vs.* John E. Roller, nor at any time prior to the rendition of the judgment in said suit nor were the vendees of plaintiff aforesaid, the persons in actual possession of said land, nor John W. Jordan made parties to the suit.

3. The proceedings in said suit prior to the rendition of said judgment and the allegations made in the petition filed by the plaintiffs McClintic & Procter in said suit were insufficient and ineffectual to confer on the district court of Limestone county, Texas, jurisdiction

either on the person of the plaintiff or over the land in controversy levied on and sold by virtue of the pretended judgment rendered therein.

4. The time given by said plaintiffs in said suit, McClintic & Proctor, within which this plaintiff was to appear and make an answer to said suit before the actual rendition of said judgment, or in default of which appearance and making answer such judgment could be rendered, was not such reasonable notice and not such a due and orderly proceeding under the facts and circumstances as disclosed by the record thereon as the law requires, even if the proceedings were in all other respects sufficient to give him an opportunity to make defense upon a fair trial.

5. The lien attempted to be enforced in said suit of McClintic & Procter *vs.* John E. Roller was an equitable lien created by operation of law and not by contract, and there has been no legislation on the part of the State of Texas authorizing a suit against a non-resident of the State to foreclose a lien of that character on land situate within the State.

6. The said suit of McClintic & Procter against plaintiff herein was not authorized by nor in accordance with any act passed by the legislature of the State of Texas.

Fifth.

That for further special answer the plaintiff denies the right
11 of the defendants to recover the sum of $300.00 claimed by them in their said answer, but in the event they should be found entitled to recover the same, then plaintiff shows the court that the said defendants have been in possession of the land in controversy since the 3rd day of March, 1891, and have enjoyed the rents and profits thereof of the value, for three years and ten months, of $575, for which plaintiff claims offset against said claim of defendant and judgment for the excess, with interest.

And this he is ready to verify. Wherefore he prays judgment and foreclosure as in his original petition.

THOS. J. GIBSON,
Att'y for Plaintiff.

Filed Jan. 23, 1895.
A. J. HARPER,
C. D. C., L. Co., Tex.

Defendants' First Supplemental Answer.

Filed 1, 23, 1895.

JOHN E. ROLLER
vs.
STEPHEN HOLLEY ET ALS. } No. 2647.

Defendants except to plaintiff's first supplemental petition because the same is insufficient in law.

They specially except to the last part of said petition, seeking to recover rent, because plaintiff is not by his original petition seeking

to recover the land, but to foreclose an alleged vendor's lien against his vendee Holley, and it is admitted in said petition that McClintic & Procter, under whose suit def'ts Williams and Jackson purchased a valid vendor's lien upon the land against the plaintiff herein.

And for answer defendants deny all the allegations in said supplemental petition.

And, answering further, they show that if Stephen and William were vendees of plaintiff at the time of the institution of the suit of McClintic & Procter *vs.* J. E. Roller, and in possession of said
12 land as such or otherwise, the said McClintic & Procter had no notice of either of said facts.

FARRAR, WILLIAMS & FARRAR,
COBB & JACKSON,
Attorneys for Defendants.

Filed Jan. 23, 1895.
A. J. HARPER,
C. D. C., L. Co., Texas.

Judgment.

District Court, January Term, 1895.

JOHN E. ROLLER
vs.
STEPHEN HOLLEY ET ALS. } No. 2647.

FEB. 7, 1895.

This day this cause coming on to be heard and the plaintiff, John E. Roller, appearing in person and by attorney and the defendants Stephen Holley and William Holley, after being duly cited to appear, came not, but wholly made default, and it appearing to the court that plaintiff's cause of action is a liquidated demand and proved by five promissory notes in writing of $228.00 each, and the clerk having assessed the damages at the sum of $1,722.66—

It is therefore ordered, adjudged, and decreed that the plaintiff, Jno. E. Roller, do have and recover of and from the defendants Stephen Holley and William Holley the sum of $1,722.66, with 10% interest thereon from date and all costs, for which let execution issue as to them.

Thereupon came the plaintiff, John E. Roller, and the defendants Joseph Peoples, H. W. Williams, and W. T. Jackson, and announced ready for trial, waived a jury, and submitted the matters at issue to the court, who, after hearing the pleadings, evidence, and argument of counsel, finds for the defendants.

It is therefore ordered, adjudged, and decreed that plaintiffs take nothing as to the defendants Joseph Peoples, H. W. Williams, and W. T. Jackson, that they go hence without day and recover of plaintiff the costs in this behalf expended, for which let execution issue.

To which ruling of the court plaintiff excepts, and in
13 open court give- notice of appeal to the court of civil appeals of the fifth supreme judicial district of Texas.

Statement of Facts.

Filed 1, 23, 1895.

In the District Court for Limestone County, January Term, 1895.

JOHN E. ROLLER
vs.
STEPHEN HOLLEY ET ALS. } No. 2647.

On the trial of the above cause we agree to submit the cause on the following statement of facts agreed:

Deed from Jordan to Roller.

First.

That plaintiff, John E. Roller, purchased the land described in petition from John W. Jordan and wife on January 3rd, 1887, and gave as part payment therefor his note for $216.17, bearing 10 per cent. interest from date, due Nov. 1, 1890, which note and deed from said Jordan and wife to Roller specially retained the vendor's lien to secure said note and interest. The residue of the purchase-money, to wit, three bonds of $261.27⅔ each, due to W. P. Brown, with interest from April 1, 1886, for which the vendor's lien was also retained, having been paid in full, the first note above mentioned being the only part of the purchase-money remaining unpaid at date of McClintic & Procter's suit.

Purchase of Note by McClintic & Procter and Institution of Suit.

Second.

That McClintic & Procter became the purchasers of said note before maturity, and after it matured, on the 24th of December, 1890, brought suit in this court to recover of plaintiff the amount due on said note, which was then subject to a credit of $18.80, as of its date, and to foreclose said vendor's lien. A copy of said petition and notice *and* annexed as exhibit to this agreement.

Residence of John E. Roller.

Third.

That at the date of the institution of said suit and ever since the plaintiff was a non-resident of Texas and a citizen of Vir-
14 ginia, and has continually resided in that State all of his life.

Service on John E. Roller.

Fourth.

That the plaintiff, John E. Roller, was served by having delivered to him in person a certified copy of the citation or notice of said

suit and with a certified copy of plaintiff's petition, such as is required by the statute of service on non-residents, and this notice and petition were served on plaintiff in Harrisonburgh, Rockingham county, State of Virginia, on Dec. 30, 1890, notifying him to appear on January 5th, 1891, being the first day of the January term of court, 1891, and a true copy of said notice and petition is incorporated into and made a part of this agreed statement of facts, and that on January 9th, 1891, the plaintiff failing to appear and answer in said suit, a judgment by default was entered against him for the sum of $276.05 and declaring a foreclosure of the vendor's lien on the land described in the petition in this suit as to said Roller, but not as to any other person, the said Roller being the sole defendant; that it required four days at the date of said service of notice for a letter to come by mail from Harrisonburgh, Va., to Groesbeck, Texas.

Costs.

Fifth.

That in said suit there was incurred in the trial and sale the sum of $23.00 costs.

Order of Sale and Deed to H. W. Williams.

Sixth.

That an order of sale issued and said land was advertised for sale and bought by H. W. Williams for $300 and deed taken to Williams, but Williams and Jackson paid the $300 to the sheriff.

Williams to Peoples.

Seventh.

That H. W. Williams conveyed said land to Joseph Peoples for $500 cash paid and $500 deferred purchase-money immediately after the purchase from the sheriff by Williams, and the said Peoples took possession of said land and has held and used it ever since, and the rental value of said land from that time to the present has been $100.00 per annum.

Deed from Roller to Stephen and William Holley.

Eighth.

That at the time of the institution of said suit, McClintic & Procter *vs.* John E. Roller, and for some time prior thereto, to wit, since January 1st, 1890, Stephen and William Holley were in possession of said land under a written memorandum of deed signed by
15 the said Roller, under which Roller had sold and conveyed to the Holleys the said tract of land for $1,140 purchase-money, with interest at ten per centum per annum from January 1st, 1891, until paid, and for their purchase-money the said Holleys executed

to the said Roller the identical bonds sued on in this case, and the deed from J. E. Roller to the Holleys was not on record in Limestone county at the time of the institution of the suit of McClintic & Procter *vs.* J. E. Roller, and prior to the time that Roller made a deed to said land to the Holleys they, the said Holleys, had been tenants of J. E. Roller and McClintic & Procter had no notice of the actual relation of the Holleys to the said Roller at the time of the institution of the suit.

JOHN E. ROLLER, *in Propria Persona,*
COBB & JACKSON, AND
FARRAR, WILLIAMS & FARRAR,
Att'ys for Def'ts.

It is agreed that the foregoing statement of facts may be used as a statement of facts for the dist. court of this county in order to decide this cause, and in the event of an appeal by either party to this agreement it shall also be used — a statement of the facts in said cause in the appellate courts or courts of whatever jurisdiction, description, or character.

JOHN E. ROLLER,
COBB & JACKSON, AND
FARRAR, WILLIAMS & FARRAR,
Att'ys for Def'ts.

(EXHIBIT.)

Petition of McClintic & Procter vs. J. E. Roller.

THE STATE OF TEXAS, }
Limestone County. }

To the hon. district court within and for Limestone county, Texas:

George W. McClintic and Charles E. Procter, who are merchants and partners, doing business under the firm name and style
16 of McClintic & Procter, and residing in said county, complaining of John E. Roller, allege that said Roller resides in the county of Rockingham, in the State of Virginia; that on the 3rd day of January, 1887, the defendant Roller made his certain promissory note in the sum of two hundred and sixteen and $\frac{17}{100}$ dollars, due and payable November the 1st, 1890, with 10 per cent. interest per annum, whereby he promised to pay John W. Jordan or order the said money and interest at the time last aforesaid, and on the same day of its making delivered said note to said Jordan; that said note is credited with the sun of $18.80 of the date it was made; that plaintiffs are now the owners and holders of said note by the endorsement of said Jordan to them in their firm name of McClintic & Procter; that no part of said note has been paid; that said note was given for purchase-money of land sold and conveyed by said Jordan to def't Roller and is secured by a vendor's lien provided for and agreed upon in said note and deed; that on said Jan. 3rd, 1887, said Jordan, by his deed of that date, conveyed the said land to said def't, Roller, which said land lies in said county

of Limestone and is part of the James Gillespie 320-acre survey — of the P. Pate 277-acre survey, and is bounded by a line beginning at a point on James Gillespie's south line 520 vrs. from his S. E. corner, and running thence S. 60° W. 320 vrs. to a stake; thence N. 35½ W. 46 vrs. to a stake; thence S. 77¾ W. 360 vs., a stake, whence P. O. 10 in. brs. N. 77¾ E., 156⅔ vs.; thence S. 16 E. 156 vs. to stake on Gillespie's S. line; thence S. 60 W. 349 vs., P. O. marked for corner tree; thence S. 72 E. 1,550 vs. to a stake; thence N. 30 W. 1,155 vs. to the place of beginning, and contains 116 acres. Defendant is in possession of said deed, and is notified hereby to produce same on the trial of this cause or secondary evidence of its contents will be used.

Plaintiffs pray for citation to def't, for judgment for their said debt and interest, costs of suit, foreclosure of lien, order of sale and writ of assistance in behalf of purchasers at sale, and all proper relief; and, as in duty bound, &c.

COBB & JACKSON,
Att'ys for Pl'ffs.

THE STATE OF TEXAS, }
Limestone County. }

17 I, J. W. Stephens, clerk of the district court of Limestone county, Texas, do hereby certify that the foregoing is a true and correct copy of the original petition in said cause styled and numbered as above now on file in said court.

Given under my hand and seal of said court, at office, in [L. S.] Groesbeeck, this the 24th day of December, A. D. 1890.

J. W. STEPHENS,
Clerk District Court, Limestone Co., Texas.

Endorsed: No. 2222½. McClintic & Procter *vs.* John E. Roller. Pl'ffs' original petition on debt and foreclosure of vendor's lien. Filed this 24th day of Dec., 1890. J. W. Stephens, C. D. C., L. Co., Tex.

Non-resident Notice.

The State of Texas to John E. Roller, Greeting:

Whereas McClintic & Procter, a mercantile firm composed of G. W. McClintic & C. E. Procter, of Groesbeeck, county of Limestone, State of Texas, did on the 24th day of Dec., A. D. 1890, file in the district court of Limestone county, State of Texas, *his* petition in suit No. 2222½ on the civil docket of said court, being suit brought by the said McClintic & Procter, as plaintiffs, against J. E. Roller, as defendant—the nature of plaintiffs' demand is as follows, to wit: Suit upon a note executed January 3rd, 1887, by John E. Roller, payable to John W. Jordan or order on or before November 1st, 1890, for the sum of two hundred sixteen and $\frac{17}{100}$ dollars ($216.17), with 10% interest per annum from date, which note has a credit of $18.80 as per the day it was made, said note being given for part purchase-money for 116 acres of land situated in Limestone county, Texas, being part of the James Gillespie 320 acre survey and Peter-

son Pate 277-acre survey, purchased from said John W. Jordan and wife Jan. 3, 1887, which land is particularly described in plaintiffs' original petition, a certified copy of which is hereto attached and reference is here made for a better description, said note and deed retaining a vendor's lien on said land to secure said note and interest, and which lien plaintiff- seek to foreclose;

18 And whereas the said petition will be heard in the said district court of Limestone county, in the town of Groesbeeck, Texas, on the first Monday in January, A. D. 1891, being the fifth day of January, 1891:

These are, therefore, to require you to appear at such time and place above stated and answer said plaintiffs' petition, a certified copy of which accompanies this notice.

Attest: J. W. STEPHENS,
Clerk of the District Court in and for Limestone County, State of Texas.

Given under my hand and seal of said court, at office, in Groesbeck, Texas, this the 24th day of December, A. D. 1890.

J. W. STEPHENS,
Clerk District Court, Limestone Co., Texas.

I certify that this is a true and correct copy of the original notice this day issued. This Dec. 24, 1890.

J. W. STEPHENS,
Dist. Cl'k, L. Co., Tex.

Endorsed: Copy to be served on John E. Roller. No. 2222½. District court, Limestone Co., Texas. McClintic & Procter *vs.* John E. Roller. Notice to non-resident. Issued Dec. 24, 1890. J. W. Stephens, clerk district court, Limestone Co., Tex. Filed Jan. 23, 1895. A. J. Harper, clerk district court, Limestone county, Texas.

Assignment of Error.

Filed 3, 18, 1895.

In District Court, Limestone County, Texas.

JOHN E. ROLLER
vs.
STEPHEN HOLLEY ET AL. } No. 2647.

And now comes John E. Roller, appellant in the cause stated and numbered as above, by attorney, and assigns the following errors, on which he relies for a reversal of the judgment of the court below, to wit:

19 First.

The court erred in holding that the judgment against appellant in the case of McClintic & Procter *vs.* John E. Roller, rendered in the district court of Limestone county, Texas, and through which

the defendants Jackson, Williams, and Peoples claim the land in controversy, was a valid judgment against appellant, and in rendering judgment against appellant in favor of the said Jackson, Williams, and Peoples herein, because the said judgment in the case of McClintic & Procter *vs.* John E. Roller was not obtained by due process of law, but was null and void because in contravention of the provisions of the 14th amendment to the Constitution of the United States, in this, that the pleadings and the agreed statement of facts in this cause show that at the time of the institution of the suit of McClintic & Procter *vs.* John E. Roller, appellant, who was defendant therein, was a non-resident of the State of Texas and a citizen of the State of Virginia, residing in the county of Rockingham, in said State of Virginia; that he was served with process requiring him to appear and answer in said cause of McClintic & Procter *vs.* John E. Roller without the limits of the State of Texas and in said county of Rockingham and State of Virginia, such service being effected by the delivery to him of a copy of the petition in said cause and notice to appear and answer therein; that he failed to answer said suit, and that a personal judgment was rendered against him by default for the sum of $276.00.

Second.

The court erred in holding that the judgment by default rendered in said suit of McClintic & Procter against appellant was a valid judgment, and in rendering judgment in favor of Jackson, Williams, and Peoples in this cause against him, because the judgment rendered by the district court of Limestone county, Texas, in favor of McClintic & Procter against appellant was not obtained by due process of law, but was null and void because in contravention of the provisions of the 14th amendment of the Constitution of the United States, in this, that the said district court of Limestone county never acquired jurisdiction over the person of appellant, and it failed to bring the land in question within its jurisdiction by issuance and levy of any process known to the law, and said suit being a suit to recover a money judgment against appellant and to foreclose a merely equitable lien created, not by contract, but by mere operation of law, the court had no jurisdiction to foreclose said lien and to order the land sold.

Third.

The court erred in holding that the judgment by default against appellant in the suit of McClintic & Procter was a valid judgment, and in rendering judgment in this suit in favor of Jackson, Williams, and Peoples, because the said McClintic & Procter judgment was null and void and was not obtained by due process of law, but was in contravention to the provisions of the 14th amendment of the Constitution of the United States in this, that the suit of McClintic & Procter *vs.* John E. Roller was brought for the purpose of obtaining a money judgment against appellant and to foreclose an equit-

able lien on land, which lien was created by operation of law, and there has never been any act passed by the legislature of the State of Texas authorizing any such suit, and in the absence of such legislation the district court of Limestone county had no jurisdiction or authority, under the facts of the case as shown herein, to render said judgment.

Fourth.

The court erred in holding that the notice to defendant in the suit of McClintic & Procter *vs.* John E. Roller was reasonable notice, and that the time was not unreasonably short because said suit was instituted on December 4th, 1890. Defendant was served with notice and copy of the petition on December 30th, 1890, to appear on the 5th day of January, 1891, that being the first day of the term of court; judgment by default was rendered on the 9th day of January, 1891. Defendant resided and was served in Virginia, and it required four days for a letter to come from Virginia to Groesbeck by mail. Said judgment, if respected, will have the effect of depriving J. E. Roller of his property without due process of law, and contravenes the constitution and laws of the State of Texas and of the United States.

Fifth.

The court erred in refusing to foreclose the vendor's lien of the plaintiff against the defendants W. T. Jackson, H. W. Williams, and Joseph Peoples, because J. E. Roller has paid all but a small portion of the purchase-money for the land and had conveyed the land to the defendants Holleys before he was sued on the balance
21 by McClintic & Procter, and said Holleys were not made parties to the foreclosure suit, and hence the legal title to the land is still in the Holleys, and they are the equitable owners of same, subject to the deferred payments of purchase-money, and inasmuch as J. E. Roller in this case has judgment against them for the price of the land in full, they should be deprived of the first and only resource to pay said Roller's debt.

Sixth.

The court erred in refusing to foreclose plaintiff John E. Roller's vendor's lien on the land against said Holleys, because the court rendered judgment for the debt in favor of said Roller against said Holleys, and the debt was for the purchase-money of the land and a lien thereon as against said Holleys.

Seventh.

The court erred in not protecting the equities of plaintiff by compelling a reconveyance of the land upon payment by plaintiff of the money expended by the defendants Williams, Jackson, and

Peoples in buying in the land when sold under the judgment of McClintic & Procter *vs.* J. E. Roller.

KIMBELL & KIMBELL,
THOS. J. GIBSON,
Attorneys for Appellant, J. E. Roller.

Filed.
A. J. HARPER,
C. D. C., L. Co., Tex.

Appeal Bond.

JOHN E. ROLLER
vs.
STEPHEN HOLLEY ET AL. } No. 2647.

Whereas, in the above styled and numbered cause pending in the district court of Limestone county, Texas, and at a regular term of said court, to wit, on the 7th day of Feb'y, 1895, the following judgment was rendered, to wit: "This day this cause coming on to be heard, the plaintiff, John E. Roller, appearing in person and by attorney, and the defendants Stephen Holly and William
22 Holly, after being duly cited to appear, came not, but wholly made default; and it appearing to the court that plaintiff's cause of action is a liquidated demand and proved by four promissory notes in writing of $228.00 each, and the clerk having assessed the damages at the sum of $1,722.66, it is therefore ordered, adjudged, and decreed that the plaintiff, John E. Roller, do have and recover of and from the defendants Stephen Holley and William Holley the sum of $1,722.66, with 10% interest from date and all costs, for which let execution issue as to them.

"Thereupon came the plaintiffs, John E. Roller, and the defendants Joseph Peoples, H. W. Williams, and W. T. Jackson, and answer ready for trial, waive a jury, and submit the matters at issue to the court, who, after hearing the pleadings, evidence, and argument of counsel, finds for the defendants.

"It is therefore ordered, adjudged, and decreed that the plaintiff take nothing as to the defendants Joseph Peoples, H W. Williams, and W. T. Jackson, and that they go hence without day and recover of plaintiff the costs in this behalf expended, for which let execution issue; to which ruling of the court plaintiff excepted and in open court gave notice of appeal to the court of civil appeals for the fifth supreme judicial district of Texas."

From which judgment the said John E. Roller has taken an appeal to the court of civil appeals for the 5th supreme judicial district of Texas.

Now, therefore, we, John E. Roller, as principal, and —— —— and —— ——, as sureties, acknowledge ourselves bound to pay to the defendant-, Stephen Holly, William Holly, Joseph Peoples, H. W. Williams, and W. T. Jackson, the sum of two hundred and fifty dollars, conditioned that the said John E. Roller shall prosecute his appeal with effect and shall pay all costs which have ac-

crued in the court below and which may accrue in the court of civil appeals and in the supreme court.

Witness our hands this the 16th day of February, 1895.

JOHN E ROLLER,
By J. B. KIMBELL,
His Attorney.
JOHN T. BLACK.
J. B. GRESHAM.

The probable amount of costs in this cause in this court and in the court of civil appeals and the supreme court is fixed at
23 $125.00, and this bond is hereby approved.

This Feb'y 16th, 1895.

A. J. HARPER,
C. D. C., L. Co., Texas.

Filed Feb'y 16, 1895.
A. J. HARPER,
C. D. C., L. Co., Tex.

Cost Bill.

To docketing	$.20	
To issuing 6 citations	4.50	
To ent. appearances	.45	
To continuance	.20	
To entering four orders	3.00	
To assessing damages	.50	
To filing 12 papers	1.80	
Approving appeal bond	1.50	
Judgment	1.25	
To taxing costs	.25	
To transcript	22.00	
To four certificates	2.00	
		$39.85
Sheriff:		
Serving five citations	$7.50	
To mileage—50 miles	2.50	
To jury tax	.50	
		10.50
Total costs		$50.35

Certificate.

THE STATE OF TEXAS, }
County of Limestone. }

I, A. J. Harper, clerk of the district court in and for Limestone county, Texas, do hereby certify that the above and foregoing twenty-two pages contain a true and correct copy of the proceedings had on the trial of cause No. 2647, J. E. Roller *vs.* Stephen Holley *et al.*, as is of record manifest.

Witness my official signature and the seal of said court, at office, in Groesbeck, Texas, this 6th day of April, 1895.

A. J. HARPER,
Clerk District Court, Limestone County.

24 Be it remembered that at a regular term of the court of civil appeals in and for the fifth supreme judicial district of Texas, begun and holden at Dallas on the 2nd day of September, A. D. 1895 (present, Hon. H. W. Lightfoot, chief justice, and N. W. Finley and Anson Rainey, associate justices), on the 26th day of October, 1895, a day of said term, the following order was made in cause No. 1352:

J. E. ROLLER
vs.
STEPHEN HOLLEY ET AL. } No. 1352. From Limestone County.

By direction of the honorable supreme court of the State of Texas it is ordered that this cause be transferred to the court of civil appeals for the 4th supreme judicial district, at San Antonio, Texas, and that the clerk of this court certify all orders made and costs accrued in this cause in this court, and transmit all the papers in this cause to the clerk of said 4th district.

Former Orders.

June 26, 1895.—Motion to file transcript granted.

I, Geo. W. Blair, clerk of the court of civil appeals of the fifth supreme judicial district of Texas, do hereby certify that the foregoing is a true copy of the orders made by this court in the above entitled and numbered cause.

Given under my hand and seal of office, at Dallas, Texas, this 5th day of November, A. D. 1895.

GEO. W. BLAIR, *Clerk.*

Endorsed: No. 1352. Certified copy of orders in court civil appeals, at Dallas. J. E. Roller *vs.* Stephen Holley *et al.* Filed in the court of civil appeals, at San Antonio, Texas, Nov. 14, 1895. H. E. Hildebrand, clerk.

25 *Opinion of Court of Civil Appeals.*

J. E. ROLLER, Appellant,
vs.
STEPHEN HOLLY ET AL., Appellees. } No. 920. Appeal from Limestone County.

This suit was instituted by appellant to recover a judgment against Stephen Holley and William Holley on five promissory notes, each for $228.00, and to foreclose a vendor's lien on 114 acres of land. Josep- Peeples, H. W. Williams, and W. T. Jackson, appellees, were made parties defendant under an allegation that they were asserting an interest in the land, and a foreclosure of the

vendor's lien was prayed for against them. Stephen and Wm. Holley did not answer, but the other appellees filed an answer, alleging that appellant purchased the land from John W. and Cora E. Jordan, giving in part payment his note for $216.17, and that a vendor's lien was reserved to secure said note; that before the maturity of said note McClintic and Procter became the purchasers thereof, and in 1890 instituted suit in the district court of Limestone county for a balance due on said note, and asked for a foreclosure of the vendor's lien on said land, and recovered judgment, as prayed for, — the sum of $276.65, with a foreclosure of the vendor's lien; that an order of sale was issued under said judgment, and the land in question was legally sold to H. W. Williams and a deed made by the sheriff to him, although it was bought for the joint benefit of said H. W. Williams and W. T. Jackson and each paid one-half the purchase-money, and that afterwards the land was sold by said parties to Joe Peeples. Appellant filed a supplemental petition, alleging that at the time of the institution of the suit by McClintic & Procter he was and has ever since been a citizen of the State of Virginia, and was not then nor has ever been a citizen of the State of Texas and that the judgment of McClintic & Procter against him was null and void, because the district court of Limestone county had no jurisdiction over him or his property; that service was obtained on him in Virginia, and the time given for him to appear and answer was not sufficient, and the same was not reasonable notice.

The cause was tried by the court and judgment by default was rendered against Stephen and William Holley for the amount of the notes and in favor of the other appellees.

26 We adopt the following conclusions of fact:

1. That plaintiff, John E. Roller, purchased the land described in petition from John W. Jordan and wife on January 3rd, 1887, and gave as part payment therefor his note for $216.17, bearing 10 per cent. interest from date, due Nov. 1, 1890, which note and deed from said Jordan and wife to Roller specially retained the vendor's lien to secure said note and interest.

2. That McClintic & Procter became the purchasers of said note before maturity, and after it matured, on the 24th of December, 1890, brought suit in this court to recover of plaintiff the amount due on said note and to foreclose said vendor's lien.

3. That at the date of the institution of said suit and ever since the plaintiff was a non-resident of Texas and a citizen of Virginia and has continually resided in that State all of his life.

4. That the plaintiff, John E. Roller, was served by having delivered to him in person a certified copy of the citation or notice of said suit and with a certified copy of plaintiff's petition, such as is required by the statute of service on non-residents, and this notice and petition were served on plaintiff in Harrisonburg, Rockingham county, State of Virginia, on Dec. 30, 1890, notifying him to appear on January 5th, 1891, being the first day of the January term of court, 1891. On January 9th, 1891, the plaintiff failing to appear and answer in said suit, a judgment by default was entered against

appellant for the sum of $276.05, and declaring a foreclosure of the vendor's lien on the land described in the petition in this suit as to said Roller.

5. That in said suit there was incurred in the trial and sale the sum of $23.00 costs.

6. That an order of sale issued and said land was advertised for sale and bought by H. W. Williams for $300 and deed taken to Williams, but Williams and Jackson paid the $300 to the sheriff.

7. That H. W. Williams conveyed said land to Joseph Peoples for $500 cash paid and $500 deferred purchase-money immediately after the purchase from the sheriff by Williams, and the said Peoples took possession of said land and has held and used it ever since.

8. That at the time of the institution of said suit of McClintic & Procter *vs.* John E. Roller and for some time prior thereto, to wit, since January 1st, 1890, Stephen and Williams Holley were in possession of said land under a written memorandum or deed
27 signed by the said Roller, under which Roller had sold and conveyed to the Holleys the said tract of land for $1,140 purchase-money, with interest at ten per centum per annum from January 1st, 1891, until paid, and for their purchase money the said Holleys executed to the said Roller the identical bonds sued on in this case, and the deed from J. E. Roller to the Holleys was not on record in Limestone county at the time of the institution of the suit of McClintic & Procter *vs.* J. E. Roller, and prior to the time that Roller made a deed to said land to the Holleys they, the said Holleys, had been tenants of J. E. Roller, and McClintic & Procter had no notice of the actual relation of the Holleys to the said Roller at the time of the institution of the suit.

It is now the settled law in Texas that service in another State upon a resident therein will not support a mere personal judgment against him. York *v.* The State, 73 Tex., 651; Kimmarle *v.* Railway, 76 Tex., 686; Maddox *v.* Craig, 80 Tex., 600, which cases follow the case of Pennoyer *v.* Neff, 95 U. S., 723.

But this rule does not apply to suits brought to recover debts secured by liens where the object of the suit is not only to recover a debt, but to foreclose the lien on land in this State, and to obtain jurisdiction to foreclose the lien it is not necessary to attach the land. Battle *v.* Carter, 44 Tex., 485; Hewitt *v.* Thomas, 46 Tex., 232.

Appellant, in the suit of McClintic & Procter against him, was served with notice, as required by law, on December 30, 1890, and he was notified to answer at the term of the district court of Limestone county which convened on January 5, 1891, and judgment by default was rendered against him on January 9, 1891. Appellant complains that he did not have sufficient time to appear and defend in that suit, and that the same was not due process, but in contravention of the constitution and laws of the State of Texas and of the United States. There is no merit in this proposition. The statute (art. 1228, Sayles' Stats.) which was in effect at the time appellant was served guaranteed to defendants five days' notice before the first day of the return term, exclusive of the days of service

and return. Appellant was given the statutory notice. If the court had jurisdiction to entertain the suit of McClintic & Procter against appellant, he would stand in the same relation to the statute that any other defendant would, and he cannot claim any special privileges because he lived in Virginia. The State of Texas, having jurisdiction by reason of lien, had the authority to
28 prescribe the manner of obtaining service. Battle *v.* Carter, 44 Tex., 485.

Stephen Holley and William Holley were in possession of the land in question when the suit of McClintic & Procter was instituted, and appellant insists that they have not received fair treatment at the hands of the court, which should have given them the right to pay off the debt due by appellant to McClintic & Procter. What right appellant has to complain of injustice done to the Holleys does not appear. He should have indicated his care and solicitude for their interests before the sale took place to satisfy his debt. It is too late for him to constitute himself the guardian of their interests. Whether the judgment in favor of McClintic & Procter affected the interests of the Holleys or not, it was certainly effective against appellant, and the wrongs that may have been perpetrated upon them cannot be used as a weapon of defense by appellant. They have not complained.

The judgment will be affirmed.

(Signed) W. S. FLY,
Associate Justice.

Endorsed: No. 920. In court of civil appeals, fourth supreme judicial district of Texas, San Antonio. J. E. Roller, appellant, *vs.* Stephen Holley *et al.*, appellees. Opinion by W. S. Fly, associate justice. Filed in the court of civil appeals at San Antonio, Texas, May 6, 1896. H. E. Hildebrand, clerk.

Judgment of the Court of Civil Appeals.

J. E. Roller, Appellant,
vs.
Stephen Holly et al., Appellees. } No. 920.

Wednesday, *May* 6, *A. D.* 1898.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the court that there was no error in the judgment, it is therefore considered, adjudged, and ordered that the judgment of the court below be in all things affirmed; that the appellant, John E. Roller, and
29 his sureties, John T. Black and J. B. Gresham, pay all costs in this behalf incurred and this decision be certified below for observance.

Motion for Rehearing.

In Ct. Civil Appeals, Fourth Supreme Judicial District.

JOHN E. ROLLER, Appellant,
vs.
STEPHEN *Roller* ET AL., Appellees. } No. 920.

And now comes John E. Roller, appellant in the cause stated above, by attorney, and moves the court to grant him a rehearing herein for the reasons following, to wit:

First. The court erred in holding that jurisdiction of the dist. court of Limestone county attached in the suit of McClintic & Proctor *vs.* John E. Roller, because, 1, said suit was not brought to foreclose a mortgage lien created by contract, but was brought to foreclose an equitable lien created by operation of law: 2, because there is no act of the legislature of Texas authorizing suit against non-residents of the State foreclosing vendor's liens on lands situate within the State.

Second. The court erred in holding that the time given appellant to answer the suit of McClintic & Proctor against him was reasonable.

Third. The court misconceived the contention of appellant in holding that he has no right to complain of injustice done to the Holleys in the judgment of the district court complained of herein. His contention is that he should have been subrogated to the rights of the Holleys, who were the owners of the land at the time of the institution of the McClintic & Procter suit, but who were not made parties thereto, and on appellant's paying to Jackson, Williams, & Peoples the money by them expended, with interest, they should have been compelled to reconvey the land or submit to a foreclosure and sale thereof to satisfy appellant's judgment against the Holleys, and the court erred in not so holding.

Fourth. The court erred in holding that the McClintic &
30 Proctor judgment against appellant was obtained by due process of law, and that the proceedings in said suit were not in contravention of the Constitution of the United States, because the conclusions of fact found by the court show that at the time of the institution of the McClintic & Procter suit against him appellant was a citizen of the State of Va., residing in the county of Rockingham, said State; that personal service was obtained in said suit on him in said Rockingham county; that the object of said suit was to obtain a money judgment against appellant and to foreclose a vendor's lien on the land in question, which facts show that the jurisdiction of the district court of Limestone county never attached either as to the person of appellant nor as to the land in controversy.

Fifth. The court erred in holding that the judgment of the dist. court of Limestone county, entered in the case of McClintic &

Procter against appellant, was obtained by due process of law, and that the proceedings therein were not in contravention of the provisions of the Constitution of the United States, because the conclusions of fact found by the court show that the McClintic & Procter suit was instituted to obtain a money judgment against appellant, who was a citizen of the State of Va. and a non-resident of Texas, and to foreclose an equitable lien on lands, and there is no act of the legislature of Texas authorizing any such suit against a non-resident of this State.

THOS. J. GIBSON,
Att'y for John E. Roller, Appellant.

Endorsed: Mo. 1020. No. 920. John E. Roller, appellant, *vs.* Stephen Holley *et al.* Motion for a rehearing. Filed in the court of civil appeals, at San Antonio, May 20, 1896. H. E. Hildebrand, clerk. Filed in supreme court, at Austin, Texas, June 19, 1896. Chas. S. Morse, clerk.

Order of Court on Motion for Rehearing.

JOHN E. ROLLER, Appellant, *vs.* STEPHEN HOLLY ET AL., Appellees. } No. 920. Appeal from Limestone County.

WEDNESDAY, *June 2nd, A. D.* 1898.

31 The motion of appellant for a rehearing, filed May 20, 1896, coming on to be heard and the court having duly considered the same, it is ordered that said motion be, and it is hereby, overruled; and it is further ordered that appellant, John E. Roller, and his sureties, John T. Black and J. B. Gresham, pay all costs of this motion.

Petition for Writ of Error.

To the honorable the supreme court of the State of Texas:

John E. Roller, who resides in the county of Rockingham and State of Virginia, complains of Stephen Holley and William Holley, Jos. Peeples, H. W. Williams, and W. T. Jackson, who resides in the county of Limestone and State of Texas, and for whom Messrs. Farrar & Williams and Cobb & Jackson, who reside at Groesbeck, in Limestone county, Texas, are attorneys of record, and respectfully represent:

1.

This suit was instituted in the district court of Limestone county by applicant on the 14th day of July, 1894, to recover a judgment against the said Stephen Holley and William Holley on five promissory notes for $228 each, of date January, 1890, payable to appli-

cant, and to foreclose vendor's lien on 114 acres of land situated in Limestone county.

That said Joseph Peeples, H. W. Williams, and W. T. Jackson were made parties defendant under an allegation that they were asserting an interest in the land, and a foreclosure of vendor's lien was sought as against them.

Defendants below were duly cited, and defendants Stephen Holley and William Holley failed to answer, but defendants Peeples, Williams, and Jackson filed an amended answer at the January term, 1895, of the court, consisting of general and special answer.

In their special answer it was alleged that in January, 1887, applicant (plaintiff below) purchased the land in question from Jno. W. and Cora E. Jordan, giving in part payment his note for
32 $216.17, due November 1st, 1890, in which as well as in the deed executed to applicant the vendor's lien was retained.

That before its maturity McClintic & Proctor became purchasers of said note, and in 1890 instituted suit on same in district court of Limestone county against applicant and for foreclosure of vendor's lien on the land.

That "after due service being had," McClintic and Proctor on January 9th, 1891, recovered judgment against applicant for $276.65, with 10 per cent. interest and costs of suit, and foreclosure of vendor's lien on the 114 acres of land in question.

That there was incurred in the suit $8.75 costs and $14.25 costs in sale of land.

That an order of sale was issued, and on March 3rd, 1891, the land was sold by the sheriff of Limestone county for $300 and bought by defendant Williams, who paid the amount to the sheriff.

That deed was made to Williams, but the purchase was made for the joint benefit of himself and defendant Jackson, each paying one-half the purchase-money.

That on May 5th, 1891, Williams, for himself and Jackson, sold the land to their codefendant Peeples under warranty deed.

Prayer that in the event plaintiff recovered the land as against defendants Williams, Jackson, and Peeples that they recover of plaintiff the $300 paid for the land, and that same be decreed a lien on the land.

To this amended answer plaintiff filed first supplemental petition, consisting of demurrer, exceptions, and answer, containing—

First. General denial.

Second. That at the time of the institution of the suit of McClintic & Proctor against him, applicant was a citizen of the State of Virginia and resided in the county of Rockingham, said State.

That in January, 1890, he sold and conveyed the land in controversy to Stephen and William Holley by written instrument signed by him, and took the notes sued on as purchase price of the land.

That he put his said vendees in possession of the land, and that they were in possession of the land at the time of the institution of the McClintic & Proctor suit and had been in possession since the sale to them, and that they nor the Jordans were made parties to that suit.

33 That the McClintic & Proctor judgment was void as to applicant, because the district court of Limestone county, Texas, never acquired jurisdiction over him nor the property in question.

That the judgment was not obtained nor was the sale of the land made and obtained by due process of law, but was in contravention of the 14th amendment to the Constitution of the United States.

That service of process on him in the McClintic and Proctor suit was obtained without the jurisdictional limits of the State of Texas, to wit, in the county of Rockingham and State of Virginia.

That no writ of attachment or other writ was levied on the land.

Third. That the proceedings in the McClintic & Proctor suit prior to the judgment and the allegations in the petition were ineffectual to confer jurisdiction on the district court of Limestone county over either the person of plaintiff or the land.

Fourth. That the time given him in which to answer the suit of McClintic & Proctor before the actual rendition of their judgment was not reasonable notice, nor such due and orderly proceedings, under the facts and circumstances, as disclosed by the record thereon, as the law requires.

Fifth. The lien attempted to be enforced in the McClintic & Proctor suit was an equitable lien, created by operation of law, and there has been no legislation in Texas authorizing such suit.

Sixth. Plaintiff denied the right of defendant- to recover the $300 claimed in answer, but if allowed to recover same, then plaintiff claimed rents and profits to amount of $575.

Defendants filed first supplemental answer, in which they alleged that if Stephen and William Holley were vendees of plaintiff at the institution of the McClintic and Proctor suit, and were in possession of the land "as such or otherwise," that McClintic & Proctor had no notice of either of said facts.

At the January term, 1895, of the court the case was tried without a jury on an agreed statement of the facts, and judgment rendered in favor of applicant against the Holleys for $1,722.66, with interest and costs of suit, but the court refused to foreclose the vendor's lien and gave judgment against applicant in favor of the said Jackson, Williams, and Peeples.

II.

A statement of the facts was incorporated into the record.

34 Errors were assigned and the case was taken by appeal to the court of civil appeals at Dallas, from which court same was transferred to the court of civil appeals at San Antonio; which court, on May 6th, 1896, by written opinion, affirmed the judgment of the district court.

On the — day of May, 1896, applicant filed a motion for rehearing, which was on June 3rd, 1896, overruled.

III.

The following questions of law were decided by said court of civil appeals for the 3*th* supreme district and were assigned as erroneous

in applicant's motion for rehearing and are here made the basis of this application, to wit:

First. The said court of civil appeals held that the jurisdiction of the district court of Limestone county attached in the said suit of McClintic & Proctor *vs.* J. E. Roller, notwithstanding said suit was brought to foreclose an equitable lien created by operation of law and not a lien created by contract, notwithstanding there is no statute in Texas expressly authorizing such a suit to be brought in the courts of Texas against a non-resident of the State.

Applicant's contention is that in the absence of such a statute or the levying of a writ of attachment or some like writ on the property the jurisdiction of the district court over the property did not attach.

See Hart *vs.* Sansom, 110 U. S. Supreme Ct., p. 151; Acts 1893 Texas Leg., p. 77.

Second. Applicant was served with a citation to appear and answer the suit of McClintic & Proctor on December 30, 1890, in Harrisonburg, Rockingham Co., Virginia.

The citation required him to appear and answer the suit in Groesbeck, Limestone Co., Texas, on January 5th, 1891.

On January 9th, 1891, judgment by default was taken against him. Applicant contends that this was not due and reasonable notice, but the court of civil appeals holds that it was.

IV.

Third. At the time of the institution of the McClintic & Proctor suit against him (applicant) the Holleys were in possession of the land under purchase from applicant, but they were not made parties to the suit and no foreclosure was had as to them.

Applicant's contention is that he should have been subro-
35 gated to the rights of the Holleys, and on paying to Jackson, Williams, and Peeples the money expended by them they should have been compelled to reconvey the land to the applicant or to have submitted to a foreclosure in this suit.

The court of civil appeals, misapprehending applicant's position, uses this language:

"What right had applicant to complain of injustice done to the Holleys does not appear. He should have indicated his care and solicitude for them before the sale took place to satisfy the debt."

At the time of the McClintic & Proctor suit the legal title to the land was in the Holleys and not in applicant, though he held a vendor's lien on the land to secure his debt.

The Holleys were entitled to a hearing and an opportunity to pay off the McClintic & Proctor lien. Applicant, being a lienholder by reason of the purchase notes executed to him by the Holleys, should be subrogated to the rights of the Holleys and given an opportunity to do what they had the right to do—pay off the encumbrance and have his foreclosure. But a small portion of the debt due by applicant for the land was unpaid when the McClintic & Proctor suit was brought. Authorities: Savage *vs.* Fairman, 53 Texas, 601;

Terry *vs.* Cutler, 23 S. W., p. 539; McKelvain *vs.* Allen, 58 Texas, 383; Howard *vs.* North, 5th Texas, 290.

Fourth. Applicant, in his motion for rehearing, submitted the following assignment of error, which was overruled by the court and is now presented as part of this application:

"The court erred in holding that the McClintic & Proctor judgment against applicant was obtained by due process of law, and that the proceedings in said suit were not in contravention of the Constitution of the United States, because the conclusions of fact found by the court show that at the time of the institution of the McClintic & Proctor suit against him applicant was a citizen of the State of Virginia, residing in the county of Rockingham, said State; that personal service was obtained in said suit on him in said Rockingham county; that the object of said suit was to obtain a money judgment against applicant and to foreclose a vendor's lien on the land in question; which facts show that the jurisdiction of the district court of Limestone Co. never attached, either as to per-
36 son of applicant nor as to the land in controversy."

Premises considered, applicant prays this honorable court to issue a writ of error, to the end that the aforesaid judgment of the court of civil appeals may be revised and corrected.

THOS. J. GIBSON,
Attorney for John E. Roller, Applicant.

Endorsed: App. No. 1127. John E. Roller *vs.* Stephen Holley *et al.* Application for writ of error. Filed in the court of civil appeals, at San Antonio, Texas, June 18, 1896. H. E. Hildebrand, clerk. Filed in supreme court June 19, 1896. Chas. S. Morse, clerk, by F. T. Connerly, deputy. Refused.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the foregoing six pages contain a true and correct copy of the petition for writ of error in application No. 1127, John E. Roller (applicant) *vs.* Stephen Holley *et al.*, together with indorsements thereon, as the same is now on file in this office.

Witness my hand and the seal of said court this 28th day of May, A. D. 1898.

[SEAL.]

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

Endorsed: No. 1127. John E. Roller *vs.* Stephen Holley *et al.* Certified copy of petition for writ of error. Filed in the court of civil appeals, at San Antonio, Texas, May 30, 1898. H. E. Hildebrand, clerk.

Judgment of the Supreme Court.

In Supreme Court of Texas, 4th District.

JNO. E. ROLLER
vs.
STEPHEN HOLLY.

JUNE 25TH, 1896.

37 This day came on to be heard the application of Jno. E. Roller for a writ of error to the court of civil appeals for the 4th supreme judicial district, and the same having been duly considered, it is ordered that said application be refused; that the applicant, John E. Roller, and his sureties, John T. Black and J. R. Gresham, pay all costs incurred on this application.

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by said court on the application of John E. Roller for a writ of error.

Witness my hand and the seal of said court this the 11th day of July, A. D. 1896.

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

Endorsed: No. 1127. John E. Roller *vs.* Stephen Holley. Copy of judgment in supreme court. Application for writ of error refused. Filed in the court of civil appeals, at San Antonio, Texas, July 13, 1896. H. E. Hildebrand, clerk.

38 *Cost Bill in Court of Civil Appeals, San Antonio, Texas.*

JOHN E. ROLLER, Appellant,
vs.
STEPHEN HOLLEY ET AL., Appellees.
No. 920. From Limestone County.

Filing record	$ .50
Docketing cause	.50
Appearances	1.00
Filing briefs and other papers	2.30
Notices	4.50
Orders	2.00
Judgment	1.00
Recording opinion	2.75
Certificate with seal	.50
Taxing cost	.50
Certified copy bill of costs	1.00
Mandate	1.50
Certified copy of opinion furnished appellant's attorney	1.60
Filing and entering motion	.35
Precepts (2)	2.00

Sheriff's fees	2.00
Transcript to supreme court	1.50
Execution for costs and return	1.50
Costs in court of appeals at Dallas	7.90
Costs in supreme court	5.90
Express charges to and from supreme court	.70
Total	$43.80

Collected by execution of appellant Dec. 24, 1896.

H. E. HILDEBRAND, *Clerk.*

Transcript for Supreme Court of United States $20.00

Paid by John E. Roller.

39 *Certificate of Clerk.*

I, H. E. Hildebrand, clerk of the court of civil appeals of the fourth supreme judicial district of Texas, do hereby certify that the foregoing is a true and correct copy of the following papers in cause No. 920, J. E. Roller, appellant, *vs.* Stephen Holley *et al.*, appellees, to wit:

1. Caption.
2. Plaintiff's first amended original petition.
3. Defendants' 1st amended original answer.
4. Plaintiff's 1st supplemental petition.
5. Defendants' 1st supplemental answer.
6. Judgment of trial court.
7. State of facts.
8. Assignments of error.
9. Appeal bond.
10. Bill of costs of lower court.
11. Certificate of district clerk to transcript.
12. Order of transfer.
13. Opinion of court of civil appeals.
14. Judgment of court of civil appeals.
15. Motion for a rehearing.
16. Order of court on motion for rehearing.
17. Petition for writ of error.
18. Judgment of the supreme court of Texas.
19. Bill of costs in court of civil appeals.

In testimony whereof I hereunto set my hand, with the seal of said court, this the same day and date above written.

[Seal Court of Civil Appeals of the State of Texas.]

H. E. HILDEBRAND,
Clerk Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of civil appeals for the fourth supreme judicial district of the State of Texas, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John E. Roller, appellant, and Stephen Holly, William Holly, Joseph Peoples, H. W. Williams, and W. T. Jackson, appellees, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in ques-

41 tion the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

Filed in the court of civil appeals, at San Antonio, Texas, Jun 22, 1898.

H. E. HILDEBRAND, *Clerk.*

Filed in the court of civil appeals, at San Antonio, Texas, Jun- 22, 1898.

H. E. HILDEBRAND, *Clerk.*

42 UNITED STATES OF AMERICA, *ss:*

To Stephen Holly, William Holly, Joseph Peoples, H. W. Williams, and W. T. Jackson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of civil appeals for the fourth supreme judicial district of the State of Texas wherein John E. Roller is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this 17th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

Filed in the court of civil appeals, at San Antonio, Texas, Jun- 25, 1898.

H. E. HILDEBRAND, *Clerk.*

43 On this 23rd day of June, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared before me, the subscriber, J. B. Gresham, sheriff of Limestone county, Texas, and makes oath that he delivered a true copy of the within citation to Cobb and Jackson, and also a true copy of the within citation to Farrar, Williams and Farrar, the said Farrar, Williams and Farrar and the said Cobb and Jackson being the attorneys of record in this cause for the within-named defendants in error, Stephen Holley, William Holley, Joseph Peoples, H. W. Williams, and W. T. Jackson.

J. B. GRESHAM, *Sheriff.*

Sworn to and subscribed the 23rd day of June, A. D. 189-.

[Seal of District Court of Limestone County, Texas.]

W. W. WRIGHT,
Clerk Dist. Ct., Limestone Co., Texas.

[Endorsed:] Filed in the court of civil appeals, at San Antonio, Texas, Jun- 25, 1898. H. E. Hildebrand, clerk.

44 Know all men by these presents that we, John E. Roller and D. S. Hendrick, as surety, are held and firmly bound unto Stephen Holly, William Holly, Joseph Peoples, H. W. Williams and W. T. Jackson in the full and just sum of five hundred dollars'

to be paid to the said Stephen Holly, William Holly, Joseph Peoples, H. W. Williams, and W. T. Jackson, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a court of civil appeals for the 4th supreme judicial district of the State of Texas, in a suit depending in said court between John E. Roller, appellant, and Stephen Holly *et al.*, appellees, a judgment was rendered against the said appellant, and the said appellant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Stephen Holly, William Holly, Joseph Peoples, H. W. Williams, and W. T. Jackson, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof:

Now, the condition of the above obligation is such that is the said appellant shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JOHN E. ROLLER.
D. S. HENDRICK.

Approved by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

Endorsed: Filed in the court of civil appeals, at San Antonio, Texas, June 22, 1898. H. E. Hildebrand, clerk.

45 SAN ANTONIO, TEXAS, *June* 27, 1898.

I, H. E. Hildebrand, clerk of the court of civil appeals of the fourth supreme judicial district of Texas, do hereby certify that the foregoing is a true and correct copy of the appeal bond filed by plaintiff in error in the case of John E. Roller, appellant, *vs.* Stephen Holly *et al.*, appellees.

In testimony whereof I hereunto set my hand, with the seal of said court, this the same day and date above written.

[Seal Court of Civil Appeals of the State of Texas.]

H. E. HILDEBRAND, *Clerk.*

46 [Endorsed:] No. 920. In court of civil appeals, fourth supreme judicial district of Texas, San Antonio. John E. Roller, appellant, *vs.* Stephen Holly *et al.*, appellees. H. E. Hildebrand, clerk.

47 Filed in the court of civil appeals, at San Antonio, Texas, Jun- 22, 1898. H. E. Hildebrand, clerk.

In the Supreme Court of the United States.

JOHN E. ROLLER, Plaintiff in Error,
vs.
STEPHEN HOLLEY ET ALS., Defendants in error.

Upon a writ of error to a final decree or judgment of the supreme court of Texas rendered on the 24th day of June, 1896, refusing a writ of error or appeal to a decree or judgment of the court of civil appeals for the fourth supreme judicial district of Texas affirming a decree or judgment of the district court of the county of Limestone, State of Texas, in the cause recently pending in said last-named court of John E. Roller *vs.* Stephen Holley *et als.*

To the honorable the judges of the Supreme Court of the United States:

The petition and assignments of error of John E. Roller respectfully showeth:

That the facts shown by the record, stripped of all technical verbiage, are succinctly as follows, to wit:

On the 14th day of July, 1894, your appellant, John E. Roller, instituted suit in the district court of Limestone county, State of Texas, against Stephen Holley and William Holley for the purpose of recovering judgment against them on five promissory notes of $228.00 each, dated January 1st, 1890, given by them to him for the purchase price of a tract of 114 acres of land in said county sold by him to them, to enforce specific performance of the contract of sale, and to subject said tract of land to the payment of the vendor's lien reserved thereon to secure said notes. To this suit Joseph Peeples, H. W. Williams, and W. T. Jackson were also made parties defendant upon the allegation that they were claiming an interest of some sort in said land, and the relief prayed for was sought as well against their interests as against those of the other de-
48 fendants. The defendants were all duly cited and Stephen and William Holley failed to answer, but the defendants Peeples, Williams, and Jackson filed an amended answer at the January term, 1895, of the court, in which they made both a general denial and a special answer, in which they alleged that your appellant, John E. Roller, had bought the tract of land in question from John W. and Cora E. Jordan in January, 1887, and had given in part payment therefor his note for $216.17, due on the 1st of November, 1890, in which note, as well as in the deed made to him, the vendor's lien had been retained; that before its maturity the firm of McClintic and Proctor had become the owners of the said note, and on the 24th of December, 1890, had instituted suit in the district court of said county of Limestone against your appellant for the foreclosure, as they termed it, of the vendor's lien on the land. They also averred that after "due service of notice" in said suit McClintic and Proctor had recovered judgment against your appel-

lant for $276.65, with interest and costs of suit; that under this judgment an order of sale was issued, the land sold by the sheriff to the defendant Williams for $300.00, who paid the same, though the defendant Jackson was interested with him in the purchase, and the two had sold the land to their codefenant, Peeples.

To this answer your appellant, John E. Roller, filed a replication, demurring to the answer as insufficient in law, and making also both a general denial of its averments, and a further special replication, in which he set up the fact that at the time of the institution by McClintic and Proctor of said suit against him, in December, 1890, and ever since he was a resident of the State of Virginia; that he had sold the land in controversy in January, 1890, a year previous, to the defendant- Stephen and William Holley by deed signed by him, had taken from them the five notes sued upon for the purchase price, and had put them in possession, and they had been in possession since the sale, and that neither they nor the Jordans,
49 the original vendors, had been made parties to the suit of McClintic and Proctor for the specific performance of your complainant's contract of purchase from the Jordans and for the enforcement of the vendor's lien reserved against the land by the Jordans. He averred also that the judgment rendered against him in the McClintic and Proctor suit was void as to him, because the district court in which it was rendered had never acquired jurisdiction over him or over the tract of land in question; that service of process upon him had not been made in Texas, but in Virginia; that no writ of attachment or other writ had been levied upon the land; that the parties in possession thereof had not been made parties to the suit, and that said judgment had not been obtained or the sale of the land made or obtained by due process of law, but in contravention of the 14th amendment to the Constitution of the United States. In addition, he averred that the service of process upon him in Virginia on the 30th of December, 1890, returnable to the 5th day of January, 1891, under a statute of the State of Texas which provided for service of process, giving five days' notice, exclusive of the day of service and the day of return, and permitted the service of such notice upon non-residents in their own States as well as upon residents within the State of Texas, was also not due process of law; that there had been no legislation of the State of Texas authorizing such a suit against non-residents for specific performance of a contract for the purchase of land, and that for that reason, as well as for the others assigned above, the said judgment and the sale made thereunder were absolutely void and of no effect as against him.

The case was tried at the January term, 1895, of the district court of Limestone county upon a statement of facts agreed to by the parties in the suit as follows:

1. "The plaintiff, John E. Roller, purchased the land described in petition from John W. Jordan and wife on January 3rd, 1897, and gave as part payment therefor his note for $216.17, bearing 10 %

interest from date, due November 1st, 1890, which note and
50 deed from said Jordan and wife to Roller specially retained the vendor's lien to secure said note and interest," the residue of the purchase-money, to wit, three bonds, of $261.27⅔ each, to W. P. Brown, with interest from April 1, 1886, for which a vendor's lien was also retained, having been paid in full.

2. "That McClintic and Proctor became the purchasers of said note for $216.17, with interest as aforesaid, before maturity, and after it matured, on the 24th day of December, 1890, brought suit to this court to recover of plaintiff the amount due on said note and to foreclose said vendor's lien."

3. "That at the date of the institution of said suit and ever since the plaintiff was a non-resident of Texas and a citizen of Virginia, and has continually resided in that State all of his life."

4. "That the plaintiff, John E. Roller, was served by having delivered to him in person a certified copy of the citation or notice of said suit and with a certified copy of plaintiff's petition, such as is required by the statute for service on non-residents, and this notice and petition were served on plaintiff in Harrisonburg, Rockingham county, State of Virginia, on December 30th, 1890, notifying him to appear on January 5th, 1891, being the first day of the January term of court, 1891; that on January 9th, 1891, the plaintiff failing to appear and answer in said suit, a judgment by default was entered against him for the sum of $276.05 and declaring a foreclosure of the vendor's lien on the land described in the petition in this suit as to said Roller," but not as to any other person, the said Roller being the sole defendant. It required four days at the date of said service of notice for a letter to come by mail from Harrisonburg, Va., to Grosbeck, Texas.

5. "That in said suit there was incurred in the suit and trial the sum of $23.00 cost."

6. "That an order of sale issued and said land was advertised for sale and bought by H. W. Williams for $300.00, and deed taken to Williams, but Williams and Jackson paid the $300.00 to the sheriff."

7. "That H. W. Williams conveyed said land to Joseph Peeples for $500.00, cash paid, and $500.00, deferred purchase-money, immediately after the purchase from the sheriff by Williams, and the said Peeples took possession of the land and has held and
51 used it ever since."

8. "That at the time of the institution of said suit of McClintic and Proctor *vs.* John E. Roller and for some time prior thereto, to wit, since January 1st, 1890, Stephen and William Holley were in possession of the land under a written memorandum or deed signed by the said Roller, under which Roller has sold and conveyed to the Holleys the said tract of land for $1,140.00 purchase-money, with interest, at ten per centum per annum, from January 1st, 1891, until paid, and for their purchase-money the said Holleys had executed to the said Roller the identical bonds sued on in this case, and the deed from John E. Roller to the Holleys was not on record in Limestone county at the time of the institution of the suit of McClintic and Proctor *vs.* John E. Roller, and prior to the time that

Roller made the deed to said land to the Holleys they, the said Holleys, had been tenants of John E. Roller, and McClintic and Proctor had no notice of the actual relations of the Holleys to the said John E. Roller at the time of the institution of the suit."

Upon this agreed statement of facts judgment was rendered in favor of your appellant against the Holleys for $1,722.66, with interest and cost of suit, but the court refused to enforce the vendor's lien therefor against the land and gave judgment against your appellant and in favor of Jackson, Williams, and Peeples for said land.

Your appellant excepted, gave notice of appeal, assigned errors, and brought the case to the court of civil appeals for the fifth supreme judicial district of Texas by appeal, and that court transferring the same to the court of civil appeals for the fourth judicial district of Texas, at San Antonio, and that court having on the 6th day of May, 1896, affirmed the decree of the district court of
52 Limestone county, your appellant applied to the supreme court of the State of Texas, the highest appellate tribunal in that State, for a writ of error, and that court having refused a writ of error or appeal to the decree of the said court of civil appeals, on the 24th of June, 1896, your appellant desires now to bring the case to this court by writ of error.

It is very clear from the record that, although your appellant, Roller, was not served with process in the State of Texas, and although he did not enter his appearance in the suit in any way, yet that a personal judgment was rendered against him, and although there was no seizure in *rem* of the tract of land in controversy, and although the persons who had been in possession of the land, as owners thereof—vendees of your appellant—for more than a year, had not been made parties to the suit, and although there had not been any garnishment in any way of the fund due from them to your appellant, notwithstanding the fact that they owed him at the time four times as much as the debt due to McClintic and Proctor, and although there was no statute of the State of Texas providing for a suit against non-residents, by order of publication or by extraterritorial service of process, to enforce specific performance of a contract to purchase and pay for a tract of land, and to enforce the payment of a vendor's lien by a sale of the land upon which it was reserved, yet the State court under a general statute which provided for five days' notice, exclusive of the day of service and of the day of return, and under another general statute which allowed personal service to be made upon non-residents in the State in which they might reside, upon a notice served upon your appellant in Virginia on December 30th, 1890, returnable to the 5th day of January, 1891, to Groesbeck, in the State of Texas, between points that required four days for a letter to be carried through the mail, took jurisdiction of your appellant personally, *rendered a judgment against him*, then took jurisdiction of the land, sold it from
53 under the feet of your appellant's vendees, robbed him of the land, and your appellant, at the same time, of the money due him from them and of the security (the land) out of which he

was to be paid his debt, under the vendor's lien reserved by him, one of the *purchasers* being one of the lawyers for the plaintiff, and that these purchasers paid only $300.00 for land which your appellant had sold the year before for $1,140.00, and which they immediately resold for $1,000.00.

It is submitted that such a proceeding was not due process of law, but was and is void.

The assignments of error of your appellant are as follows, to wit:

1. The court erred in holding that the judgment against your appellant, Roller, in the case of McClintic and Proctor *vs.* John E. Roller, rendered in the district court of the county of Limestone, State of Texas, and through which the defendants Jackson, Williams, and Peeples claim the land in controversy, was a valid judgment against your appellant.

He submits that said judgment is void; that it was not obtained by due process of law, but in contravention of the provisions of the 14th amendment to the Constitution of the United States in this: that the pleadings and the agreed statement of facts in this case show that at the time of the institution of the suit of McClintic and Proctor *vs.* John E. Roller your appellant, who was the only defendant therein, was a non-resident of the State of Texas and a resident of the State of Virginia, residing at Harrisonburg, in the county of Rockingham, in said State; that he was served with process, requiring him to appear and answer in said cause, at his residence, in said county of Rockingham and State of Virginia, such service being affected by the delivery to him of a copy of the petition in said cause and of a notice to appear and answer therein; that he did
54 not appear in said suit in any way, and that notwithstanding this fact a personal judgment was rendered against him by default for the sum of $276.05, an order of sale issued thereon, and the land sold under said order.

2. The court erred in holding that this judgment by default rendered in said suit of McClintic and Proctor against your appellant was a valid judgment and in rendering judgment in favor of Jackson, Williams, and Peeples in the new cause against him for the land for the reason that the judgment rendered by the district court of Limestone county, Texas, in favor of McClintic and Proctor against your appellant was not obtained by due process of law, but was null and void, because obtained in co-travention of the provisions of the 14th amendment to the Constitution of the United States in this: that the said district court of Limestone county not only never acquired jurisdiction of the person of your appellant, but it failed to make his vendees, who were the persons in possession of the land in question, parties to the suit or to garnishee or to attach or to levy upon the funds due from them to your appellant, and utterly failed to bring the said tract of land within its jurisdiction by the issuance and levy of any process known to the law or by any seizure *in rem* of any sort of said land, and said suit being a suit to recover a money judgment against this appellant and to enforce the specific performance of a contract on his part for the purchase of said tract of land and to enforce the lien reserved to secure the unpaid purchase-

money; and, there being no act or statute of the legislature of the State of Texas to allow such a suit to be brought against a non-resident in the manner in which said suit was brought, the said court had no jurisdiction in said suit to subject said land to sale upon the alleged default of your appellant in paying the purchase-money claimed to be due from him; and it erred, moreover, in not holding that the notice to your appellant in the suit of McClintic and Proctor *vs.* John E. Roller was wholly insufficient, and, that not being reasonable, it was not due process of law; therefore
55 appellant having been served with notice on the 30th of December, 1890, in Virginia, to appear on the 5th of January, 1891, in Texas, at a point to reach which it took a letter four days to come from Harrisonburg, in the State of Virginia, by mail.

Argument as to the Law Applicable to These Assignments of Error.

The question of law presented for decision, and from which there is no escape, is this:

Has a judgment or decree in the State court of the State of Texas been obtained by "due process of law" in a proceeding instituted against a non-resident to compel a specific performance on his part of a contract to purchase and pay for a tract of land, and in case of his default to enforce the vendor's lien reserved to secure the unpaid purchase-money, not under any statute of the State authorizing and permitting such a suit, but under the general powers of a court of equity, and that, too, upon a notice served upon the party interested in another State, under a statute of the State of Texas which required the giving of five days' notice *exclusive* both of the day of service and of the day of return, and which in this instance was served upon the non-resident on the 30th of December, 1890, in the State of Virginia, returnable to the 5th day of January, 1891, at the county seat of Limestone county, in the State of Texas, to reach which a letter required four days by the quickest course of mail, or, of course, to go in person, and then, upon such notice, without any seizure *in rem* of the land, by attachment or otherwise, and without any notice of any sort to the parties in possession of the land or any enquiry about their rights and without any garnishment of the funds due from them to the non-resident party in interest on their purchase of the land from him, to enter a personal judgment against the non-resident alone, sue out an order of sale, and under such judgment and order of sale sell the land to third parties for one-fourth of its value, one of the purchasers, being one of the plaintiff's attorney-, thereby robbing the vendees in possession of their rights in the land without any notice to them whatever and the
56 non-resident vendor of the purchase-money due him upon the sort of notice above set forth?

It is most earnestly submitted that under the authorities there can be but one answer to the question.

In Reno on Non-residents certain well-settled principles of law are laid down as follows—sections 183, 218, 241:

"The settled doctrine now is that a judgment on a money demand "against a non-resident defendant upon publication or any other of "substituted service short of personal service of process within the "State or a voluntary appearance by the defendant in the action is "null and void *in personam;* that such State process is contrary to "'due process of law' and the fourteenth amendment." § 183.

"In order that a valid judgment may be recovered upon a money "demand against the property of a non-resident defendant, upon "substituted service of process, his property must be seized and "brought under the control of the court at the commencement of "the proceedings." § 218.

"When, however, there is a seizure of the defendant's property at "the commencement of the action or in garnishment, what is equiva-"lent to seizure at that time, namely, service of process upon the "garnishee, accompanied in both cases by publication or other form "of substituted service against the non-resident defendant, it is well "settled that such process is due process of law in attachment suits, "and that a judgment so rendered WILL DIVEST THE DEFENDANT OF "HIS TITLE TO SUCH PROPERTY, and will protect the garnishee from "the danger of double payment." § 241.

The reason for this is that preliminary seizure and publication afford the defendant *adequate notice* of suit and an opportunity to appear and defend it before judgment.

"The law assumes that property is always in the possession of its owner in person or by its agent, and when suit is instituted against a non-resident and *his property is seized this interference with*
57 *his possession* is sufficient to give him notice, *if he be otherwise properly cited*, that the court may proceed to condem- the property and subject the same to sale."

In Reno on Non-residents, section 242, the question is discussed still further in the following language:

"How is property brought under the control of the court? In "the first place, it is very clear that its mere existence and situation "within the territorial jurisdiction of the court are not sufficient to "subject it to the control of the court. There must be some out-"ward and visible act done by the court through its proper officer "to indicate its dominion and power over the property. In admi-"ralty this act is an actual seizure of the ship by the marshal, but "there is one act which necessarily precedes the seizure, namely, "*the finding of the ship.* So in proceedings *quasi in rem* in the "common-law courts by attachment, which are in their 'essential "nature' proceedings *in rem*, the act of finding the defendant's "property is a necessary precedent act to that of seizure or its "equivalent."

"In Cooper *vs.* Reynolds the court said: 'The court in such a "suit cannot proceed unless the officer *finds some property* of defend-"ant on which to levy the writ of attachment. A return that *none* "*can be found is the end* of the case, and deprives the court of fur-"ther jurisdiction, though the publication may have been duly "made and proven in court.'" § 242.

2. But it is also declared by the authorities:

That no proceeding against a non-resident, except under a statute of the State *especially provided for the case*, amounts even to constructive notice.

In Hollingsworth *vs.* Barber, 4th Peters, page 474, the court unanimously said that—

"Even in cases expressly authorized by the statute of the State a publication is only constructive notice to the parties, but
58 if the publication in the particular case be unauthorized, no principle is perceived upon which it can be regarded even as constructive notice."

"It is an acknowledged general principle that judgment- and decrees are binding only upon parties and privies. The reason of the rule is founded in the immutable principles of natural justice that no man should be pre*du*iced by the judgment or decree of a court without the opportunity of defending that right. This opportunity is afforded, or supposed in law to be afforded, by a citation or notice to appear, actually served or *constructively* by pursuing such means as the law may in special cases regard as equivalent to personal service. The course of proceeding in admiralty cases and some other cases where the proceeding is strictly *in rem* may be supposed to be exception to this rule."

"They are not properly exceptions. The law regards the seizure of the thing as constructive notice to the whole world, and all persons concerned in interest are considered as affected by this constructive notice; but if these cases do form an exception, the exception is confined to the class already noticed, where the proceeding is strictly *in rem*, and in which *the thing condemned is first seized and taken into the custody of the court.* The case under consideration is not properly a proceeding *in rem*, and *a decree in chancery for the conveyance of land* has never yet, within my knowledge, been held to come within the principle of proceeding *in rem*, so far as to dispense with the service of process on the party. *There is no seizure nor taking into the custody of the court of the land so as to operate as constructive notice.* CONSTRUCTIVE NOTICE CAN, THEREFORE, ONLY EXIST IN THE CASES COMING FAIRLY WITHIN THE PROVISIONS OF THE STATUTE authorizing the court *to make orders of publication and providing that the publication when made shall authorize the court to decree. It has been already shown that this case is not within the provisions of any statute.*"

"*It would seem to follow that the court acted without authority,*
59 *and that the decree is void for want of jurisdiction in the court.*"

In the earlier cases it was said by the court, "There must be a seizure in order to vest the possession of the thing in the offended sovereign and enable his court to proceed against it. Those interested in the property which has been seized are considered as privies to this inquiry, and all nations admit that the sentence, whether correct or otherwise, is conclusive." Rose *vs.* Himely, 4th Cranch's Rep., page 277.

It will be interesting to quote from *from* each of the later cases in your honor's court showing the gradual evolution of the principles of law applicable to such cases as this before the court.

Thus in Cooper *vs.* Reynolds, 10th Wallace, p. 316, it was held that—

"*Jurisdiction of the person* is obtained by the service of process or by the voluntary appearance of the party in the progress of the cause."

"*Jurisdiction of the res* is obtained by *a seizure* under *process of the court*, whereby it is held to abide such orders as the court may make concerning it."

"It is to be observed that in reference to jurisdiction of the person *the statutes of the States* have provided for several kinds of service of original process, short of actual service, on the party to be brought before the court, and the nature and effect of this service and the purpose which it answers *depends altogether upon the effect given to it by the statute.* So, also, while the general rule in regard to jurisdiction in *rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired *by acts* which are of equivalent import and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of the writ of attachment or seizure of real estate, which, being incapable of removal and lying within the territorial jurisdiction of the court, is for all practicable purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court."

In the later case of Heidritter *vs.* Elizabeth Oilcloth Co., 112 U. S. Rep., page 301—

The court, after quoting from Cooper *vs.* Reynolds, 10 Wallace, 112, part of the sentence quoted above, proceeded to say:

"He, the defendant, *could be bound personally* only by his coming or being brought personally within the jurisdiction of the court. *But the land might be bound* without actual service of process upon the owner *in cases* where the only object of the proceedings *was to enforce a claim against it specifically of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some assertion of its control and power over it.* This, we have seen, is ordinarily done by actual seizure, but it may be done by the mere bringing of the suit in which the claim is sought to be enforced, WHICH MAY BY LAW be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit."

Finally, in the still later case of Freeman *vs.* Alderson, 119 U. S. Rep., page 187, the court announced these most important conclusions:

"There is, however, a large class of cases which are not strictly *actions in rem*, but are frequently spoken of as *actions quasi in rem*, because, though not against persons, they only seek to subject *certain*

property of those persons to the discharge of the claim asserted. Such are actions in which property of non-residents is attached and held for the discharge of the debts due by them to citizens of the State and actions for the enforcement of mortgages and other liens.

61 Indeed all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, IN THAT THE INTEREST OF THE DEFENDANT IS ALONE SOUGHT TO BE AFFECTED, *that citation to him is required*, and THAT JUDGMENT THEREIN IS ONLY CONCLUSIVE BETWEEN THE PARTIES."

This is exactly what the supreme court of Texas itself held in a case almost entirely similar to the case presented in the record—that of Savage *vs.* Fairman, 53 Texas, p. 601—the important difference between the two cases, however, being that in that case the original vendor was actually served with process within the State of Texas, and not constructively by service outside of the State.

In Savage *vs.* Fairman it was held that the only effect of the suit in which the first vendee was made a party and served with process in person in the State, while the subsequent vendees claiming under him in possession of the land were not made parties, was to obtain a personal judgment against the first vendee alone. If he had been, as your appellant was in the present case, a non-resident, and he had not been served with process inside of the State, but only given constructive notice, it could not even have been said that there was a *valid personal judgment against him.* It would have been a mere nullity.

If, according to the principles accepted, as it appears, in your honor's court and in the Texas supreme court as well, a sale, even under a valid judgment, such as that in the Texas case was held to be, could affect nothing more as against the first vendee than his interest in the land, it follows necessarily that if he had no interest in the land, the sale did not and could not, as a matter of course, carry any title to the land with it.

How much more certain is it that a sale under an invalid and void personal judgment, like that against your appellant,

62 who had long before sold all interest held by him in the land to parties who were then in possession, could carry no title to the land, either from anybody or to anybody.

3. A final and fatal objection to the validity of the judgment against your appellant, under which the land in the hands of his vendees was sold away from them, is the fact that the notice given WAS NOT REASONABLE. It was served on the 30th day of December, 1890. It was returnable to the 5th day of January, 1891. The law of Texas excluded both the day of service and the return day. If a letter had started from the place of service, or if your appellant had gone in person, it would have required all the four days, including the whole of the third of January, 1891, to reach the place to which he was summoned for the 5th. Was this reasonable notice?

DID IT REACH THE DEFENDANT IN TIME TO ENABLE HIM TO DEFEND THE ACTION? If you exclude the day of service and the return day, as the Texas statute requires, and the time for communication between the two points, it left the defendant with but one day for preperation for his defence.

It is submitted that such a notice was wholly insufficient and inadequate, and that such a course of proceeding must be held to be in violation of all of the requirements of law in regard to notice.

In fine, it appears that, upon a constructive notice served upon your appellant alone outside of the State of Texas, and not even then a reasonable notice, but one wholly insufficient and inadequate in length of time to enable him to appear and defend the action, and without any proceeding *in rem* or garnishment whatever, and all this, too, without any State statute authorizing such a suit against non-residents, a void and invalid judgment was rendered against him, the land, which was not then his property, sold away from his vendees, and he himself deprived, by means of that same judgment, of a debt of $1,140.00 due to him from said vendees for said land.

63 Surely it cannot be said that this was done by "due process of law."

"The question may be asked, 'In what way, then, or by what "process of attachment, can the State, where land lies, subject it to "the jurisdiction of its courts, so that a valid judgment can be "rendered against it on a personal demand against the non-resident "owner?' That the State has the constitutional power to do this, "by process adapted to the purpose, is undoubted; BUT IN ORDER "THAT THE PROCESS PROVIDED BY THE STATE MAY COMPLY WITH THE "REQUIREMENTS OF DUE PROCESS OF LAW, IT MUST AFFORD THE DE-"FENDANT REASONABLE OR ADEQUATE NOTICE OF SUIT, AND ONE "WHICH FROM THE NATURE OF THE PROCESS WILL BE LIKELY TO "REACH HIM IN TIME TO DEFEND THE ACTION."

Reno on Non-residents, section 244.

Wherefore your petitioner prays that a writ of error may be awarded him to the final decree or judgment of the supreme court of Texas refusing a writ of error or appeal, to the decree or judgment of the court of civil appeals for the fourth supreme judicial district of Texas affirming the decree or judgment of the district court of the county of Limestone, State of Texas, in the cause recently pending in said last-named court of John E. Roller *vs.* Stephen Holley *et als.*, that said writ may be directed to said supreme court of appeals of Texas as to the part of the record in said cause in said court, and to the said court of civil appeals for the fourth supreme judicial district of Texas as to the part of the record in said cause in said court.

To the end that said assignments of error may be considered by said court of appeals and said decree may be reviewed and served.

And he will ever pray, &c.

JOHN E. ROLLER.

[Endorsed:] John E. Roller *vs.* Stephen Holley & Co. Petition for writ of error and assignments of error. Filed in the court of civil appeals at San Antonio, Texas, Jun- 22, 1898. H. E. Hildebrand, clerk.

64 [Endorsed:] Application No. —, fourth district. John E. Roller, appellant, *vs.* Stephen Holley *et al.*, appellees. From Limestone county. Transcript from the court of civil appeals at San Antonio.

Endorsed on cover: Case No. 16,933. Texas 4th supreme judicial district court of civil appeals. Term No., 348. John E. Roller, plaintiff in error, *vs.* Stephen Holly, William Holly, Joseph Peoples, *et al.* Filed July 20th, 1898.

No. 104.

Brf. of Laudley & Roller for P. E. (?)

Office Supreme Court U. S.
FILED
NOV 10 1899
JAMES H. MCKENNEY
Clerk

Filed Nov. 10, 1899.

IN THE

Supreme Court of the United States.

JOHN E. ROLLER, Plaintiff in Error,

vs.

STEPHEN HOLLY, WILLIAM HOLLY, JOSEPH PEEPLES, ET ALS., Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

Evening News Print, Harrisonburg, Va.

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vs.

STEPHEN HOLLY, WILLIAM HOLLY, JOSEPH PEEPLES, ET ALS., Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

I.

For concise statement of the case, See Printed Record, p. 33–36.

II.

For assignment of errors relied upon, See Printed Record, p. 37–38.

III.

For original brief of the argument for plaintiff in error, See Printed Record, p. 38–43.

IV.

The Texas Statutes, to which reference need be made in this case, are to be found in Sayles Texas Civil Statutes.

I. Article 1228 which provided at the time of the trial of the suit of McClintic & Proctor against

John E. Roller, that the time for service of process was five days, exclusive of the day of service and return day. As to this, there is no dispute between the parties before the Court.

II. Art. 1240, which reads thus:

"Where the defendant is absent from the State, or is a non-resident of the State, the clerk shall, upon the application of any party to the suit, his agent or attorney, address a notice to the defendant requiring him to appear and answer the plaintiff's petition at the time and place of holding of the Court, naming such time and place. Its style shall be 'The State of Texas,' and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties, and the nature of the plaintiff's demand, and shall state that a copy of the plaintiff's petition accompanies the notice. It shall be dated and signed and attested by the clerk, with the seal of Court impressed thereon; and the date of its issuance shall be noted thereon; a certified copy of the plaintiff's petition shall accompany the notice."

III. Art. 1234, which reads thus:

"Where a defendant has been served with such notice he shall be required to appear and answer in the same manner, and under the same penalties as if he had been personally served with a citation within this State."

IV. Art. 1280, which reads thus:

"The fifth day of each term of the District Court and the third day of each term of the County Court are termed appearance days."

V. Art. 1281, which reads thus:

"It shall be the duty of the Court on appearance day of each term, or as soon thereafter as may be practicable, to call in their order all cases on the docket which are returnable in such term."

VI. Art. 1282, which reads thus:

"Upon the call of the appearance docket, or at

any time after appearance day, the plaintiff may take judgment by default against any defendant who has been duly served with process and who has not previously filed an answer."

VII. Art. 1340, which reads thus:

"Judgments for the foreclosure of mortgages and other liens shall be, that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and (except in judgments against executors, administrators and guardians) that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution of the judgment; and if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid out of any other property of the defendant, as in case of ordinary executions."

V.

The Texas statutes, quoted above and in the brief, filed on behalf of the defendants in error, pages 3 and 5, show that there is no statute of the State of Texas, which provides directly and specifically for a suit for specific performance, or to foreclose a lien or mortgage as against non-resident, brought in *only* by service by publication or by constructive service outside of the State. The only statute cited by the plaintiff in error in this brief by defendants in error in their brief is a *mere general provision* for bringing in non-resident defendants IN ANY CASE *by publication.*

On page 8 of the brief for defendants in error it is admitted that the difference between the Texas statute, Art. 1230, quoted by them, and the Nebraska statute, which was the subject of consideration in the case of Arndt vs. Griggs, 134 U. S.,

p. 316, was that in the Texas statute, it is provided that in all actions of whatever character or form without describing them, except, of course, such actions as are not in rem or quasi in rem as in the case of Pennoyer vs. Neff, 95 U. S. R., p. 714, there may be service out of the State, while in the Nebraska statute *the particular actions* are described in which service by publication may be had.

But it is contended in said brief for defendants in error that while the Texas statute is general, and while it fails to describe the cases in which there may be constructive service, "yet *there is no argument or reason* for saying that there can be no constructive service in those cases, in which the Constitution of the United States and the 14th Amendment do not prohibit it."

It is submitted in reply that this contention is directly in opposition to the opinion of the Court, in the case of Arndt vs. Griggs, 134 U. S., p. 329.

In the opinion of the Court in that case, p. 329, it is distinctly held as it was in the case of Hart vs. Samson, 110th U. S., p. 155, that "*unless otherwise specially provided by statute*" the proceeding was in personam, and did not amount even to constructive notice to the non-resident and was a nullity. This opinion was in exact accordance, too, with the principles that were laid down long before in the well-settled case of Hollingsworth vs. Barber, 4th Peter, p. 474, already cited in full in the printed record, on page 40, "There is no seizure nor taking into the custody of the Court of the land so as to operate as constructive notice. Constructive notice can, therefore, only exist in the cases *coming fairly within the provisions of the statute authorizing the Court to make orders of publication* and *providing that the publication when made shall authorize the Court to decree.* It has been already

shown that this case is not within the provisions of ANY STATUTE."

But if further argument were needed to convince the Court that in the original proceeding of McClintic & Procter vs. John E. Roller, under which the defendants in error seek to shelter themselves, there was a personal judgment against the non-resident and a seizure and sale of property, claimed to be liable for said debt, *after such personal judgment had been rendered*, the Texas statutes quoted on pages 4 and 5 of the brief will suffice.

Art. 1340, page 4, declares that the judgment against the defendant "shall be that the plaintiff recover his debt, damages, and costs; that there be a foreclosure of the plaintiff's lien on property subject thereto, and that an order of sale shall issue to an officer of the county directing him to seize and sell the same under execution," and "if the same cannot be found or the proceeds of sale be insufficient to satisfy the judgment then to make the money remaining unpaid out of any other property of the defendant, as in ordinary executions."

If to the plain language of these statutes themselves there be added the opinion of the Supreme Court of the State of Texas in the case of Savage vs. Fairman, 54th Texas, p. 601, in which it was held that the only effect of the suit in which the first vendee alone was made a party and in which he was served with process *in person, in the State*, while the subsequent vendees claiming under him, who were in possession of the land, were not made parties, was to obtain a *personal judgment against the first vendee alone*, can there be a further doubt as to the fact that only *a personal judgment* was obtained against John E. Roller, the only defendant in the McClintic & Proctor suit?

Can there be any doubt about the *fact*, when

it is one of the facts agreed, that a judgment by default was rendered against him, he being the sole defendant? P. 10, Printed Record.

Can there be any doubt about the fact that it was after this judgment was rendered that an order of sale was issued, directing the sheriff to "seize and sell the same, under execution, in satisfaction of the judgment, and if the property cannot be found or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in the case of ordinary executions," and that under this order the land was *seized*, for the first time in the whole proceeding, and that the same was advertised and sold, and can there be any doubt that under the words of the statute of the State of Texas, Art. 1340, the sheriff was directed by the order of sale, in the event of loss of the property or deficiency in the sale, to make the money or any balance remaining unpaid out of any other property of the defendant?

Can there be any doubt, too, not only that this was a personal judgment by default against the sole defendant, John E. Roller, but that if it was merely a decree for specific performance or enforcing a vendor's lien, that there was no special statute in the State of Texas which provided for such a proceeding in such a case against non-residents, but only a general statute allowing service of process on such non-resident? Can there be any doubt about the fact that there was no seizure of the land, but that under a personal judgment rendered against the first vendee the land was SUBSEQUENTLY seized and sold?

Must not this Court say as it said in the case of Hollingsworth vs. Barber, 4th Peters, p. 474:

"The law regards the seizure of the thing as constructive notice to the whole world, and all

persons concerned in interest are considered as affected by this constructive notice; but if these cases do form an exception, the exception is confined to the class already noticed, where the proceeding is strictly in rem, and in which the thing condemned is FIRST SEIZED AND TAKEN INTO THE CUSTODY OF THE COURT. The case under consideration is not properly a proceeding in rem, and a decree in chancery for the conveyance of land has never yet, within my knowledge, been held to come within the principle of a proceeding in rem, so far as to dispense with the service of process on the party. There is no seizure nor taking into the custody of the Court of the land so as to operate as constructive notice. *Constructive notice* can, therefore, *only exist in the cases coming* fairly *within the provisions of the statute* authorizing the Court to make orders of publication and providing that the publication, when made, shall authorize the Court to decree. It has been already shown that this case is not within the provisions of any statute."

These doctrines are repeated in substance both in the decision in Hart vs. Samson, 110th U. S., p. 131, and in that in Arndt vs. Griggs, 134th U. S., p. 329.

Surely these considerations are decisive of the case before the Court.

Nor can it be argued that although the sole defendant John E. Roller was not brought personally within the jurisdiction of the Court, and therefore not bound personally by the judgment rendered against him, yet that the land might be and was bound.

In some of the later cases, while the doctrine of the necessity of the seizure under the process of the Court to give the Court jurisdiction of the *res* is still insisted upon, yet it is also said that jurisdiction may be also acquired by acts of equivalent import which stand for and represent the dominion of

the Court over the thing and in effect subject it to the control of the Court.

The opinion of the Court in Cooper vs. Reynolds, 10th Wallace Rep., p. 112, is still the law of the land.

In that case it is said:

"The power to render the decree or judgment which the Court may undertake to make in the particular cause depends upon the nature and extent of the authority vested in it *by law* in regard to the subject matter of the cause."

It is to be observed that in reference to jurisdiction of the person, *the statutes of the States* have provided for several kinds of service of original process short of actual service on the party to be brought before the Court, and the nature and effect of this service, and the purpose which it answers depends altogether *upon the effect given it by the statute.* So also while the general rule in regard to jurisdiction in rem requires the actual seizure and possession of the res by the officer of the Court, such jurisdiction may be acquired by acts, which are of equivalent import, and which stand for and represent the dominion of the Court over the thing, and in effect subject it to the control of the Court. Among this latter class is the LEVY *of a writ of attachment* or SEIZURE *of real estate*, which being incapable of removal and lying within the territorial jurisdiction of the Court by the officer's levy of the writ and return of that fact to the Court."

In the case of Mankin vs. Chandler & Co., 2nd Broekenbrough Reports, p. 130, Chief Justice Marshall quotes from the English case of McDaniel v. Hughes, 3 East, 367, in which it was contended "that three parties are necessary to form an attachment—the plaintiff, the defendant, and the garnishee. The plaintiff must prove his debt, the defendant must have due notice of the process against him, and *the garnishee must be in actual*

possession of the defendant's property which is to be attached," and this contention, he says, was not controverted. It was because the person who claimed the property was a party of the suit, that the Court was authorized to pronounce judgment in the case.

"It is presumable," says Chief Justice Marshal, "that the person whose property is seized, is either himself attentive to it or has placed it in care of some person who has the power and whose duty it is to represent him and assert his claims."

It is submitted that in no case to be found anywhere was it ever said that a suit instituted against a non-resident alone, which ignored the fact that the land against which proceedings were being taken had been sold by him and was in possession of his vendees, without making them parties to the suit and without any seizure of the land until after a personal judgment had been rendered against a non-resident defendant and an order of seizure and sale had issued was such "open and public exercise of dominion over the land for the purposes of the suit as to be equivalent to a seizure."

It is submitted that it was nothing more or less than an absolute failure to make such seizure or to exercise any dominion whatever over the land or those in possession of it, except upon a void personal judgment against a non-resident.

Nor will the argument avail, that in the suit of McClintic & Procter vs. John E. Roller all the title of Jordan and wife and all the title of John E. Roller, "*whatever he had*," were foreclosed and ordered to be sold, and that the same was sold at sheriff's sale, when Williams bought for himself and Jackson, and that this sale conveyed to them a good and valid title.

This is the contention of the defendants in error, but it is exactly the opposite of the doctrine

laid down in the opinion of this Court, in the case of Freeman vs. Alderson, 119 U. S., p. 187, already cited—pages 41 and 42 of the Printed Record. There the Court said that "actions, *quasi in rem* differ among other things, from actions which are strictly IN REM, in that the interest of *the defendant is alone sought* to be affected, that citation to him is required, and that judgment therein is only conclusive *between the parties.*"

The Supreme Court of Texas held the same thing in the case of Savage vs. Fairman, 53 Texas, p. 601, as already quoted.

Now it is a fact agreed that at the time of the institution of the McClintic & Procter suit John E. Roller, who was the sole defendant in the first suit, had sold and conveyed all interest in the land to the Hollys, and the only interest he had in the matter was in $1,140.00 purchase money due him from them. The defendants in error say that Roller's interest, "whatever he had," was sold. This expression practically admits that Roller had no interest in the land. *If he had no interest in the land*, and the proceeding could only affect his interest, "whatever he had," the sale and the seizure of the land under a personal judgment against him and the sale of the same to Williams and Jackson could be nothing more than a nullity, and could carry no title of the land from Roller, who was the only defendant before the Court, to Williams or anybody else.

The defect in the proceeding was that there was NO SEIZURE *of the land as defendant's property* at the commencement of the action, nor was there any service of process upon the Hollys, who were in possession of the land and indebted to Roller in more than four times the amount which he owed to McClintic & Procter, so as to garnishee the money in their hands and divest them of their title to the property if they failed *to pay* the debt for Roller, or

to protect them from double payment if they did pay.

The result has been to deprive the plaintiff in error here, John E. Roller, upon a mere constructive notice to him, of the purchase money due him from his vendees, the Hollys, and to deprive the Hollys, without any notice in the suit to them whatever, of the land itself, and in thus depriving them of the land, deprive the said Roller also of the only security which he had for his unpaid purchase money.

Surely such a judgment or decree of the State of Texas in such a proceeding against a non-resident unauthorized and unsupported by any statute of the State was not obtained by "due process of law."

VI.

The argument is seriously made for the defendants in error—page 11—that because the plaintiff in error, John E. Roller, was not proceeded against by publication, but was personally served in Virginia with the citation and a copy of McClintic & Procter's petition, that fact makes a difference in their favor.

It is well settled that a personal service upon a non-resident outside of the limits of the State has no greater or other effect than if he had been proceeded against by order of publication. There is surely no need to cite authorities in support of this proposition.

VII.

But in addition the agreed statement of facts —page 10—shows that the said Roller was served with the said notice and petition in the State of Virginia on the 30th day of December, 1890, notifying him to appear on January 5th, 1891, at Groesbeck, Texas, and that it required four days

from the date of the service of the said notice for a letter to go by mail from Harrisonburg, Va., the place of service, to Groesbeck, Texas.

Under the Texas statute you must exclude both the day of service and the return day. If a letter had started then from the place of service, or the plaintiff in error had gone in person, it would have required all of the four days, including the 3d of January, 1891, in which to reach his destination, leaving him but one day, and that day a Sunday, in which to prepare his defence The four days required for a letter or for the defendant himself to reach the place of trial expired on the 3d of January, 1891, and then came Sunday, the 4th, followed by Monday, the 5th, the first day of Court. Was this reasonable or adequate notice of the suit? Did it reach the plaintiff in error in time to enable him, even if he abandoned all other business, to defend the action? The State of Texas has herself answered the question as to the reasonableness of such a notice by since changing the time of notice, making it ten days under its new statute instead of five.

Independent of that significant fact, it is submitted with confidence that there cannot be found a case in jurisprudence in which it is held that one day's notice, even if it was not a Sunday, of a suit was either reasonable or adequate, and gave the defendant time within which to defend the action brought against him.

It is not believed this Court will so hold.

At common law it is said:

"With respect to the mode of service there is an obvious analogy between mesne process in an action and process in other cases, and some principles may be extracted from the decisions respecting the service of a summons to answer an information before a justice of the peace. In general there *must*

be personal service, or the summons actually come to the parties in possession in a *reasonable time* before the hearing, so as to enable him without OMISSIS OMNIBUS ALIIS NEGOTIIS to appear, or the justice should not proceed, but issue a fresh summons."

See 3d Chitty's General Practice, p. 144, also 2d Chitty's General Practice, p. 176.

On page 176 it is said: "A man ought not to be required *omissis omnibus aliis negotiis* to answer on THE SAME OR EVEN THE *next day*, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence and even the convenience of his witnesses should be considered, and therefore, in general, SEVERAL DAYS should intervene between the time of summons and the hearing. In the superior courts, in general, at least eight days of notice, inquiry and of trial are essential for the preparation of the defence."

In the 3d Blackstone's Commentaries, p. 357, it is said: "In case the plaintiff intends to try the cause he is bound to give the defendant (if he lives within forty miles of London) eight days' notice of trial; and if he lives at a greater distance, then fourteen days' notice, in order to prevent surprise."

It has been objected in commenting on 20th General Rule of Hilary, Term 4, W. 4, that "FORTY-EIGHT HOURS would appear to be in most cases TOO SHORT A PERIOD within which a party should give his assent or dissent to the admission of instruments in evidence." See 3d Chitty's General Practice, p. 112.

Where the summons was to appear on the SAME DAY the Court held it EXTREMELY UNREASONABLE. See 2d Chitty's General Practice, p. 176.

Tested by these principles, surely the ONE DAY, and that a Sunday, in this case, which it is admitted by defendants in error here in their brief, was all the time the defendant had in the cause within which to prepare his defence, was unreasonable and

the statute which provided for such a notice did not provide for "due process of law."

W. S. LAIDLEY,
JOHN E. ROLLER,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

JOHN E. ROLLER, Plaintiff in Error,

vs.

STEPHEN HOLLY AND OTHERS, Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR, JOHN E. ROLLER.

To the Honorable Judges of said Court:—

It appears from the record that McClintic and Proctor brought suit against Roller in the State Court of Texas, and their petition appears on page 11 of the record, in which they sought to enforce the specific performance of a contract to purchase a tract of land in that State, sold by one Jordan, their assignor, to Roller, and in connection therewith, to subject the land to an equitable lien created by operation of law and not a lien created by contract, for a balance of purchase money remaining unpaid thereon, there being no statute however expressly authorizing such a suit to be brought in the Courts of Texas against a non-resident of the State.

The Texas Court issued the notice and it was sent to Harrisonburg, Va., and was served on Roller on December 30th, 1890, to appear January 5th, 1891, at Groesbeck, Texas, to defend said

action in the Texas Court, but there was no seizure in rem, by attachment or otherwise of the land, nor were the Hollys, to whom Roller had sold the land, and who were in possession of the same, made parties to the suit, nor was the debt due from them to Roller, which was also a vendor's lien on the land, levied upon by garnishment. In default of the appearance of the defendant, a judgment was rendered against Roller, and an order of sale of the land was made, and the land was sold. At this sale H. W. Williams and W. L. Jackson bought the land at a very inadequate price and sold the same to Joseph Peeples.

Roller sometime thereafter instituted his suit in the State Court against Stephen and William Holly, his vendees, for the purpose of specifically enforcing his contract of sale to them and to subject the land to the payment of the purchase money due him, and to this suit he made Joseph Peebles, H. W. Williams and William L. Jackson, as claiming to be the owners of the land and as asserting an interest therein adverse to his claim, parties defendant also.

The last named three defendants made answer and set up therein that the land had been sold under decree of Court, in the suit of McClintic and Proctor against Roller, that Williams and Jackson had bought the land and had sold it to Peebles. To this answer as insufficient in law, Roller filed a demurrer and a special replication also, in which he claimed that the judgment in that suit and the sale of the land had not been obtained by due process of law, but in violation of the Fourteenth Amendment of the Constitution of the United States, upon the ground that as there was no statute in the State of Texas authorizing such a suit against a non-resident, for the specific performance of a contract to purchase land or to enforce an equitable lien, for the unpaid purchase money, created by operation of law and not created by any contract, and as there

was no levy of any writ of attachment or other like writ on the property, the jurisdiction of the State Court over the property did not attach, and the proceeding was a nullity therefore as to him, and moreover that the notice given to him was insufficient and unreasonable and was not due notice, so that the whole proceeding was void, as not being due process of law.

The State Court gave Roller a personal judgment against the Hollys for the purchase money due him on the land, but gave a judgment in favor of Jackson, Williams and Peeples for the land itself, a decision of the cause which is absurd and inconsistent upon its face and contradictory of itself. Roller then made application to the Court of Civil Appeals, and the case was heard therein and the judgment of the lower court was affirmed.

An application was then made to the Supreme Court of Texas for a writ of error, and the same was which in effect was an affirmation of the judgment of the Court of Civil Appeals. Then an application was made to your Honors Court and a writ of error was allowed to the judgment of the State Court.

THE ISSUES.

The Plaintiff Roller in each of the Courts in the State of Texas, inferior and appellate, made the point:

I.

That inasmuch as there was no statute of the State of Texas authorizing such a suit against a non-resident for the specific performance of a contract to purchase land or to enforce an equitable lien, for the purchase money, created by operation of law and not created by contract, and as there had been no seizure in rem of the lands nor any notice to Roller's vendees, who were in possesion thereof, nor any garnishment of the purchase

money due him from them, the jurisdiction of the Courts of the State of Texas did not attach, and the whole proceeding was void as to him as not being due process of law, and cited in support of this proposition the cases of Hart vs. Sampson, 110 U. S. Sup. Ct., page 151, and Arndt vs. Griggs, 134th U. S. Sup. Ct., page 316.

That the time given in the notice served upon him in Harrisonburg, Va., Dec. 30th, 1890, to appear in Groesbeck, Texas, on 5th of January, 1891, was wholly unreasonable and insufficient, and was not due process of law, and was not such due and orderly proceeding under the facts disclosed by the record, as the law requires to constitute due process of law.

II.

That he was entitled because of his lien against the Hollys to be subrogated to their rights as subpurchasers of the lands in controversy, which under well settled decisions of the Court of Texas included the right to pay to Jackson, Williams and Peeples the money expended by them and compel the said Jackson, Williams and Peeples to reconvey the land to them or to have submitted to a foreclosure for the benefit of Roller, subject to the right of the said Williams, Jackson and Peeples to a repayment of the money expended by them as aforesaid, and he cited in support of this proposition the following authorities: Savage vs. Fairman, 53 Texas, 601; Terry vs. Cutler, 23 S. W., p. 539; McKelvain vs. Allen, 58 Texas, 383; Howard vs. North, 5th Texas, 290.

THE DECISION.

The cause was tried upon the issues thus made up and was decided by the Tribunals of the State of Texas against the plaintiff in error practically upon all of them.

Neither of the Courts of the State of Texas, in-

ferior or appellate, however, including the District Court, the Court of Civil Appeals and the Supreme Court of that State, referred to or passed upon, in any manner, the first of the issues thus presented to them, but in the judgment rendered by them and in the opinion filed by Associate Justice Fly, of the Court of Civil Appeals, ignored the decisions cited to them of the Supreme Court of the United States in the cases of Hart vs. Samson and Arndt vs. Griggs, in which it was distinctly held that "unless otherwise specially provided by statute" the proceeding was in PERSONAM and did not amount even to constructive notice to the non-resident and was a nullity.

The Courts of the State of Texas did hold upon the other issues presented to them that the judgment was valid and the proceedings had thereon was due process of law, not because Roller, the plaintiff in error, had any opportunity to be heard, or to make any defence, or that he could have done so, but because, as Associate Justice Fly says in his opinion, "he was given the statutory notice," which then only required five days before the first day of the return day of the Court, and he "could not claim any special privileges because he lived in Virginia," and denied the claim of Roller to the right to be subrogated to rights of the Holleys and to redeem the land by repaying to Williams, Jackson and Peeples the money expended by them in purchasing the land under the Williams and Proctor judgment.

ARGUMENT UPON THE LAW.

I.

Surely it is unnecessary to cite any other authorities than those of Hart vs. Samson, 110 U. S., page 151, and Arndt vs. Griggs, 134th U. S., page 329, to demonstrate that the Courts of Texas erred in failing to pass upon the first of the issues

thus presented to them, and that upon that issue alone, if upon no other, their judgments must be reversed and annulled.

II.

As to the sufficiency of the notice. It will be observed that there is a repetition of the requirement of due process of law in the Constitution of the State of Texas, and it would seem that something was intended; something in the guaranty that before life, liberty or property should be taken from any one that there should be *due process of law*.

This evidently was made for the protection of the citizens of the United States, and it would seem that there was wisdom in the provision to prevent one State from passing laws whereby her Courts could deprive a non-resident of his property and give it over to a resident of said State, and her Courts to decide that it was properly and legally done.

Due process of law, as understood by the average citizen, would mean that process of law which was proper, appropriate and suitable. How the Courts of the State of Texas could have reached the conclusion that five days' notice was sufficient in any and all cases, no matter where the defendant might be when served, or how situated he might be, is difficult to comprehend, especially in view of the fact that there are other Court Houses within her borders which a resident of said State could not reach, perhaps, within said five days, and no doubt there are many places in Texas that a resident of the Northern States could not possibly reach within said five days. It must be therefore that the Legislature of that State had arrived at the conclusion that there was no necessity for a defendant to have any notice, or to make any appearance or to undertake to defend at all against any complaint that might be set up against him if he had property within the State.

It would seem that the Courts of Texas intended to decide in the case before the Court that inasmuch as there was a vendor's lien, that is a mere equitable lien created by law, and not created by contract, to secure the payment of the notes held by McClintic and Proctor on the property once owned by Roller, which was real estate in Texas, that the Court had jurisdiction of the property, in any view of the matter, whether there was or was not a statute of the State such as the case of Hart vs. Sampson and Arndt vs. Griggs had decided to be necessary, and it mattered not whether the defendant, Roller, was present or not, whether he had any notice or not, or whether the notice given him afforded him an opportunity to appear and defend said suit or not.

The Texas Courts seem to have reached the conclusion that while there can be no personal judgment rendered against a defendant, who has been served out of the State, yet when it is proceeding to deprive a person of his property situate in that State the rule has no application; that when the property of a non-resident is in the State of Texas the Court can issue a notice giving the defendant five days' notice, and then the property may be sold.

It remains for Your Honors' Court to decide whether, under the circumstances of this case, this was due process of law and a valid judgment.

In 111 U. S., 712, and cases cited, it is defined to be due process of law, when there is both *due notice and an opportunity to be heard*, and on page 709 it is said that if the proceeding be found to be "arbitrary, oppressive and unjust" it is not due process of law.

It must be that the defendant has been properly brought into Court, and he must be given an op-

portunity to make his defence, and when this is not done there is no due process of law.

See 20 Am. State Reports, 547, and notes where many decisions are collected, 556.

43 Am. State Reports, 525, State vs. Billings.

42 Am. State Reports, 595, Lawson vs. Dickey.

27 Am. State Reports, 759, Doyle, petition.

28 S. E. Reporter, 909, Violet's Heirs vs. City Council, 1896, Supreme Court of Appeals of Virginia, and cases cited.

A distinguished text writer in discussing the question how a State in which land lies can subject it to the jurisdiction of its Courts, so that a valid judgment can be rendered against it on a personal demand against a non-resident owner, declares "that the State has the constitutional power to do this by process adapted to the purpose is undoubted; but in order that the process provided by the State may comply with the requirements of due process of law, IT MUST AFFORD THE DEFENDANT REASONABLE OR ADEQUATE NOTICE OF SUIT, and one which from the nature of the process will be likely TO REACH HIM IN TIME TO DEFEND THE ACTION." RENO ON NON-RESIDENTS, SECTION 244.

It is a significant fact that the Legislature of the State of Texas since the controversy has arisen, in this case, has amended the law as to notice and it now provides that ten days' notice shall be given, instead of five. It may well be asked, why this change, if five days' notice was reasonable and sufficient in all cases?

According to the argument of Justice Fly of the Court of Civil Appeals, if the statute giving five days' notice was due process of law as to the plaintiff in error because he "had received the statutory notice," the same would have been true if the statute had provided for one day's notice, instead of five, or if the statute had provided that no notice need be

given at all, provided only it applied to residents and non-residents alike.

Nor can it be argued that the State is sovereign as to all property within its limits and may prescribe in what manner the non-resident owner of such property may be brought before its Courts. It is distinctly decided that it must provide a statute authorizing its Courts to make a publication or give defendant constructive notice by service outside of the State, and declaring that such publication or such service, when made, shall authorize the Court to decree, in which case such constructive notice is sufficient under the authority of Hart vs. Samson and the other cases cited.

In the case before the Court the point is distinctly made that there never was a statute of the State of Texas authorizing such proceedings as was had in the case before the Court, and even if the State of Texas had enacted such a statute, yet if it were in the language of Your Honors' Court in Hager v. Reclamation District, 111 U. S., 709, "found to be arbitrary and oppressive and unjust," it might be declared to be not due process of law.

It may be argued that the plaintiff in error, Roller, had from the 5th of January until the 9th in which to appear and answer and defend, and that this made the notice sufficient, and made it due process of law. It does not appear in the record anywhere that Roller could have done so. The opinion of the Court of Civil Appeals does not place its decision upon any such law, but upon the statute which requires five days' notice and upon the right of the State of Texas to prescribe the five days' notice for residents and non-residents alike, holding that the latter could claim no special privileges no matter where such non-resident might live. The notice served on Roller appears on page 13 of the record, and it says to him that the plaintiff's petition will be heard at Groesbeck, Texas on the first

Monday in January, which is the fifth day of January, 1891, and you are required to appear at such time and place and answer said petition. Was this notice given to Roller in order to induce him to stay away, because he would think he could not possibly get to Texas and make answer to the petition on Monday, the fifth day of January, since he could only get there on Sunday before, and no sooner, and would have to go into Court the next day? Did not McClintic and Proctor know that Roller would consider it an impossibility to reach Groesbeck, Texas, in time to make a defence, and that he would remain away rather than attempt a vain thing? When they misled him by such a notice, as was perhaps the case, could they obtain any benefit from the fact that he was so misled?

Moreover, if the Texas statute provided for the summons upon five days' notice to answer a petition on the fifth of January, while at the same time it gave the defendant four days more in which to make an answer, of which fact he is not informed in the notice, is not the effect of the statute to mislead the defendant, and does it constitute due process of law?

Surely it is not due process of law to make the time in which the defendant is to appear so short that it is an impossibility to comply with the law.

Surely it is not due process of law to provide for process by which the full time given in which to appear, is hidden from the defendent, and he is deprived thereby of the privilege of appearing. It is submitted that such laws do not constitute due process of law.

There cannot be due process of law which does not give a defendant ample time to prepare his defence and time to go and attend the Court and present said defence.

There was no time in this case given in which to

ascertain what was to be done, or how to do it, and none in which to do it.

In Davidson vs. New Orleans, 96 U. S., 97, it is said that when the party appeared in both Courts and had a full and fair trial in each of said Courts, if such is not "due process of law" the words can have no meaning, and we should say that where no opportunity was given in which he could appear, that if such could be called "due process of law" the words could have no meaning.

In Hager vs. Rec. Dict., No. 108, 111 U. S., 711, it is said: "Such assessments can only be enforced by suits, *and of course to their validity it is essential that notice be given to the tax payer and opportunity be afforded him to be heard respecting such assessments.*" * * * A number of decisions as to the necessity of notice and opportunity to be heard cited by counsel and given in a note are all satisfied when a hearing is thus allowed.

Where one will have to make a race with an express train and take all chances of missing connections, and other delays, in order to get to the place of hearing, to say nothing of other business matters demanding attention, the needs of one family, and other just demands upon his time, and to say nothing of making any preparation for defence, it certainly cannot be said that such notice was *due process*; in fact it would be very *undue*, and no process of law.

The ancient practice under the common law tolerated no such unreasonable haste and speed.

2 Chitty's General Practice, page 176.

III.

The plaintiff in error, Roller, was deprived by the decrees complained of in the record of another valuable right of property that belonged to him.

It may be stated in this way: First.—It is very certain that the Hollys as sub-vendees of Roller

were entitled to pay off the balance due McClintic and Proctor from Roller, and to retain the land as their property, subject only to any unpaid balance which they might owe the said Roller, after crediting what they had paid for him, upon their original indebtedness to him. This right is conceded and sustained by numerous decisions of the Supreme Court of the State of Texas. It is but honest and simple justice and would be recognized and enforced by the Courts of equity in any State; second.—Now Roller holding the lien against them and the land is entitled by subrogation to this right of the Hollys, as a security for his debt. The statement of this equity, ought to be all that is necessary to cause its acceptance by any Court.

Yet the Courts of the State of Texas denied this right to Roller and deprived him of his property in that particular also, by refusing to pass upon or determine the question, and by so doing—by failing and refusing to award him this right—under their decrees, they deprived him of this right of property without due process of law.

CONCLUSION.

It is submitted in conclusion that it is clear that the defendant, Roller, has been deprived of his property under a proceeding that was not due process of law and that this Court must so hold

W. S. LAIDLEY,
For Plaintiff in Error.

Supreme Court U. S.
FILED
JAN 17 1900
JAMES H. McKENNEY,
Clerk.

No. 104.

Brf. for [redacted]

Filed Jan. 17, 1900.

IN THE SUPREME COURT OF

THE UNITED STATES.

JOHN E. ROLLER, PLAINTIFF IN ERROR,

vs.

STEPHEN HOLLY,
WILLIAM HOLLY,
JOSEPH PEEPLES,
ET AL. } DEFENDANTS IN ERROR.

BRIEF OF APPELLEES,

PEEPLES,
WILLIAMS, AND
JACKSON.

[redacted]

BLEED THROUGH

JOHN E. ROLLER,
Plaintiff in error,
vs.
STEPHEN HOLLY,
WILLIAM HOLLY,
JOSEPH PEEPLES,
ET AL.

In the Supreme Court of the United States.

—o—

To the Hon. the Supreme Court of the United States:

The Appellees in this cause respectfully submit as a counter proposition to Appellant's first assignment of error:

That the original judgment in the case of McClintic & Procter vs. John E. Roller, rendered in the District Court of Limestone county, Texas, is a valid judgment, and is not obnoxious to the objection that the service of citation upon the present Appellant was in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF FACTS FROM THE RECORD UPON WHICH THIS PROPOSITION IS FOUNDED.

The Appellant, John E. Roller, bought the land in controversy in this cause from Jordon and wife on January 3rd, 1887, and gave as part payment therefor his note for $216.17, bearing 10 per cent interest per annum from date, due November 1st, 1890, which note and deed from Jordan and wife to Roller specially retained the vendor's lien to secure said note and interest, the remainder of the purchase money notes to W. P. Brown, having been paid in full. McClintic & Procter became the purchasers of the above note of $216.17; that at the time McClintic & Procter filed their suit against Appellant—he was a citizen of Virginia; that Appellant was served in this suit by having delivered to him in person a certified copy of the citation together with a certified copy of Plaintiff's petition for five days exclusive of the day of service and the first day of court; and on default day, which was the 5th day of the term of court, the Defendant in said suit, John E. Roller, failing to appear, judgment was rendered against him by default for the amount of the note, interests and costs, with a foreclosure of the vendor's lien on the land, upon which it was a lien, and ordering its sale to satisfy the judgment. It required four days for a letter to come from Harrisonberg, Virginia, to Groesbeeck, Texas. [See Record, pp. 34 and 35.]

AUTHORITIES UNDER THIS PROPOSITION AND STATEMENT.

Sayles' Texas Civil States, Vol. 1, p. 417 and Art. 1228 and p. 418, Art. 1230 and Art. 1234, and Arts. 1280-1281 and 1282 and 1340.

Battle vs. Carter, 44 Tex., p 485.

BLEED THROUGH

John E. Roller vs. Stephen Holly, 35th S. W. Rep., p. 1074.
Hewitt vs. Thomas, 46th Tex., p. 232.
Oswald vs. Kampmann, 28th Fed. Rep., 36.
Martin vs. Pond, 30th Fed. Rep., p. 15.
Pennoyer vs. Neff, 95 U. S., pp. 572 and 573.
Heinritter vs. Elizabeth Oil Cloth Co., 112 U. S., p. 294.
Arnt vs. Griggs, 134 U. S., p. 316.
American and Eng. Ency. of Law, Vol. 22, p. 143.

———o———

ARGUMENT UNDER THIS PROPOSITION.

In Appellant's petition for writ of error, on page 34, he states that the time for service of process at the date of McClintic & Procter's suit was five days exclusive of the day of service and return day, which is correct, and we therefore do not quote the Texas statute on this subject, found in Art 1228 of Sayles' Texas Civil Statutes, but in accordance with the requirements of the rules of this Hon. Court, we quote Art. 1230 and Art. 1234, 1280–1281 and 1282 and 1340, referred to above.

Art. 1230 reads thus—

"Where the Defendant is absent from the state, or is a non-resident of the state, the clerk shall upon the application of any party to the suit, his agent or attorney, address a notice to the defendant requiring him to appear and answer the Plaintiff's petition at the time and place of the holding of the court, naming such time and place. Its style shall be, "The State of Texas," and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties, and the nature of the Plaintiff's demand, and shall state that a copy of the Plaintiff's petition accompanies the notice. It shall be dated and signed and attested by the clerk, with the seal of

the court impressed thereon, and the date of its issuance shall be noted thereon; a certified copy of the Plaintiff's petition shall accompany the notice."

Art. 1234 reads thus—

"Where a Defendant has been served with such notice, he shall be required to appear and answer in the same manner and under the same penalties as if he had been personally served with a citation within this state."

Art. 1280 reads thus—

"The fifth day of each term of the District Court and the third day of each term of the County Court are termed appearance days."

Art. 1281 reads thus—

"It shall be the duty of the court on appearance day of each term, or as soon thereafter as may be practicable, to call in their order all cases on the docket which are returnable to such term."

Art. 1282 reads thus—

"Upon the call of the appearance docket, or at any time after appearance day, the Plaintiff may take judgment by default against any defendant who has been duly served with process and who has not previously filed an answer."

Art. 1340 reads thus—

"Judgments for the foreclosure of mortgages and other liens shall be, that the Plaintiff recover his debt, damages and costs, with a foreclosure of the Plaintiff's lien on the property subject thereto, and (except in judgments against executors, administrators and guardians) that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the

BLEED THROUGH

same as under execution, in satisfaction of the judgment; and if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions."

These articles from Sayles are the law of Texas to-day, except that to-day there must be ten days service, exclusive of the day of service and return day, and except appearance-day, which is now on the 2nd day of court. Under Texas decisions, which have become rules of property in this state, the Supreme Court, in the case of Foster vs Powers, 64th Tex., p. 247, it is held that when a vendor reserves in his deed an express vendor's lien to secure the purchase money, the superior title to the land is in the vendor, and a subsequent vendee in possession is not a necessary party to a suit to foreclose an express lien reserved in a deed to his vendor, and the purchaser at sheriff's sale under the judgment of foreclosure, though a third party, may maintain trespass to try title against such subsequent vendee in possession, who was not a party to the suit to foreclose.

The case of McCamly vs. Waterhouse, 80th Tex., p. 340 establishes the proposition that the legal assignment by the payee in a vendor's lien note carries with it the lien as incident to the debt. There are many Texas cases to the same effect. [See Buckler's 1 Civil Digest, Vol. 3, page 359, Art. 75.] Under these decisions McClintic & Procter, as the assignees of Appellant's note to Jordan and wife, held the lien that Jordan and wife had on the land against Roller and his vendees

The effect of the Texas decisions upon this subject, of which there are many, is that all the title of

Jordan and wife, and all the title of John E. Roller, whatever he had, were foreclosed and ordered to be sold under McClintic & Procter's judgment against John E. Roller and was sold at sheriff's sale, when Williams bought for himself and Jackson, and conveyed a good and valid title, provided the citation served upon Roller was due process within the meaning of the Fourteenth Amendment to the Constitution of the United States; and this is the only question in this case. The Hollys are not complaining, and could not in this Court.

The proposition quoted by Appellant from Reno we are not disposed to challenge as abstract propositions of law, but we submit with due respect that they do not apply to the facts of this case. In the case of Pennoyer vs. Neff, Mr. Justice Field, speaking of the validity of constructive service by publication, says: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, *or of some interest therein, by enforcing a contract or lien respecting the same.*" (Italics ours.) Further on he says that in the broader sense of proceedings in rem, are included, "Such cases (as those) commenced by attachment against the property of debtors or instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they affect property in the state, they are substantially proceedings in rem in the broader sense which we have mentioned."

It is urged that the case of Savage vs. Fairman, 53rd Tex., p. 601 is an authority for the proposition that in a suit by a vendor against his vendee upon purchase money notes he gives for land, where the vendee has again sold the land to a second purchaser with notice of the lien held by the original vendor, the second vendee not being a party to the suit, the

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judgment recovered is in effect a personal judgment. The case does not so hold, but it declares that the original vendor may make the second vendee a party to a second suit in which the sale under the first judgment may be set aside, and the credit on the execution cancelled, *the plaintiff being the purchaser of the land*, at the sheriff's sale under the original judgment, and in the second suit he may have a personal judgment on his note, with a foreclosure of his vendor's lien against his vendee, and a foreclosure of his lien against the second vendee. So far as the judgment in both suits is concerned, it is a personal judgment against the first vendee for money, and a judgment in rem or quasi in rem against the land. The case can not be tortured so as to support the proposition that a judgment of a foreclosure of a vendor's lien in Texas is a judgment in personam and not in rem. It in fact oparates upon land to subject it to the satisfaction of an established debt, and to transfer the title thereto by sheriff's sale, if that becomes necessary. In the 53rd Texas case Fairmann brought his second suit to get rid of Fannie Savage's apparent title from Walter Savage. As Fairmann was the purchaser under the judgment against Walter Savage, there could have been no objection to the second suit that was brought, or to the form in which he brought it, but he could, instead of pursuing the course he did, have brought an action of tresspass to try title against Fannie Savage and maintained it according to the authority of Foster vs. Powers, 64th Tex., p. 247, and if a stranger had bought the land instead of Fairman, he would have been driven to sue Fannie Savage in an action of tresspass to try title or ejectment. The title to the land passed to Fairman in the sale under his first judgment. It was an action in rem or quasi in rem—it was a foreclosure of a vendor's lien on land, and has all of the elements of a judgment in rem in

its broader sense, as stated by Justice Field in Pennoyer vs. Neff, supra.

In the later case of Arndt vs. Griggs, 134 U. S., p. 316, the validity of a statute of Nebraska, which provided service by publication upon nonresidents "in actions which relate to or the subject of which is real or personal property in this state, when any defendant has or claims a lien or interest, actual or contingent, therein, etc.," was upheld by this Honorable Court. While this section of the Nebraska statute was not under review in this case, another section providing for service by publication on non-residents when the action was to quiet title was passed on, yet it is clear from the reasoning of the court that it would hold all the sections of the Nebraska statute providing for service by publication as valid, as due process within the meaning of the Fourteenth Amendment to the Constitution of the United States, and that the states have a right to enact such legislation. [See the case referred to in Arndt vs. Griggs.]

The difference between the Texas statute, Art. 1230, which we have quoted above and the Nebraska statute, is that in all actions of whatever character or form, without describing them, in Texas, except, of course, such actions as are not in rem or quasi in rem, as in the case of Pennoyer vs. Neff, there may be valid service out of the state, while in the Nebraska statute the particular actions are described in which service by publication may be had. This can not affect the principle. If the legislature of a state can by giving a definition of an action in rem authorize the recovery of a judgment in personam upon constructive service by publication, as it could evade the force and effect of the Constitution of the United States and the decisions of the Supreme Court thereunder. The Texas statute is general and applicable

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to all cases which under the Fourteenth Amendment to the Constitution permit constructive service. It cannot with any semblance of correctness be said that at the time of McClintic & Procter's suit against John E. Roller there was no legislation in Texas which authorized the service of Roller in Virginia, because the Texas Statute does not, like the Nebraska statute, mention or describe the special cases by name in which service by publication may be had; but the proper construction of our statute is that constructive service is good in all cases only in which they "*affect property in this state,*" whether the action be to quiet title, to recover land under an action of tresspass to try title, to foreclose a mortgage or enforce a lien, to partition land and possibly other actions which relate to the transmission of title to land in this state. The failure of the Texas statute to describe the cases in which there may be constructive service is no argument or reason for saying there can be no constructive service in those cases in which the Constitution of the United States and the Fourteenth Amendment do not prohibit it.

It is universally true, we believe, that the legislature of a state has a right to prescribe the mode of transferring real estate situated within its limits, and if it has, it would seem to result logically and inevitably that it has a right to declare in suits affecting its transmission by judicial sale, what sort of process shall be requisite to bring the parties, although non-residents, into court. It has a right to prescribe the proceedings by which this end is to be attained; otherwise the sovereignty of the state over her soil vanishes.

We think that Appellant's citation of authorities are not fortunate. In the case of Hollingsworth vs. Barber, 4th Peters, p. 474, the Supreme Court decided as a matter of law and of fact that there was

We believe the judgment and foreclosure proceedings in McClintic & Procter's suit to be valid, that Jordan and wife's title and Roller's title passed by sheriff's sale to H. W. Williams, and that the Defendant Peeples now has the title to the land in controversy.

Respectfully submitted,

W. F. Jackson
H. W. Williams
Jos. E. Peeples

ROLLER *v.* HOLLY.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS.

No. 104. Submitted January 18, 1900. — Decided February 26, 1900.

e statute authorizing service of process by publication or otherwise n absent and non-resident defendants, has no application to suits *in onam;* but is a sufficient authority for the institution of suits *in rem*, re, under recognized principles of law, such suits may be instituted nst non-resident defendants.

a statute specifies certain classes of cases which may be brought nst non-residents, such specification operates as a restriction and

Statement of the Case.

limitation upon the power of the court; but where the power is a general one it is, as respects suits *in rem*, subject to no limitation.

Where service of process was made upon a defendant residing in Virginia, requiring him to appear and answer a suit in Texas within five days, it is held that such notice was not a reasonable one, was not "due process of law" within the Fourteenth Amendment to the Constitution of the United States, and that a judgment obtained upon such notice was not binding upon the defendant.

THIS was an action instituted July 14, 1894, by the plaintiff Roller in the District Court of Limestone County, Texas, to recover a judgment against Stephen Holly and William Holly upon five promissory notes for $228 each, dated January 1, 1890, payable to plaintiff, for the purchase price of a tract of one hundred and fourteen acres of land in that county, sold by him to them, and also to foreclose a vendor's lien upon the land to the amount of such notes.

To this action Joseph Peoples, H. W. Williams and W. T. Jackson were also made parties defendant under an allegation that they were asserting an interest in the land; and a foreclosure of the vendor's lien was sought as against them. The defendants were all duly cited; the Hollys failed to answer, but the defendants Peoples, Williams and Jackson filed an amended answer at the January term, 1895, of the court, in which they alleged that the plaintiff Roller bought the land in question from John W. and Cora E. Jordan in January, 1887, and gave in part payment therefor his note for $216.17, due November 1, 1890, in which note as well as in the deed made to him a vendor's lien was retained; that before the maturity of this note the firm of McClintic & Proctor had become its owners, and on December 24, 1890, began in the District Court of Limestone County a suit against the plaintiff for a foreclosure of the vendor's lien upon the land; that, "after due service being had," McClintic & Proctor on January 9, 1891, recovered a judgment against the plaintiff for $276.65, with interest and costs of suit, and an order for the foreclosure of the vendor's lien; that an order of sale was issued, and on March 3, 1891, the land was sold by the sheriff of Limestone County for $300, and bought by defendant Williams, who paid the amount to the sheriff, though the defendant Jackson was interested with him

in the purchase, and on May 4, 1891, the two sold the land to their codefendant Peoples.

Prayer: That in the event plaintiff recovered the land as against the defendants Williams, Jackson and Peoples, they recover of plaintiff the $300 paid for the land, and that the same be decreed a lien thereon.

To this amended answer plaintiff filed a first supplemental petition, consisting of demurrer, exceptions and answer, containing —

First. A general denial.

Second. That at the time of the institution of the suit of McClintic & Proctor against him, plaintiff was a citizen of the State of Virginia, and resided in the county of Rockingham, in said State.

That in January, 1890, he sold and conveyed the land in controversy to Stephen and William Holly by written instrument signed by him, and took the notes sued on as purchase price of the land.

That he put his said vendees in possession of the land, and that they were in possession of the land at the time of the institution of the McClintic & Proctor suit and had been in possession since the sale to them, and that neither they nor the Jordans were made parties to that suit.

That the McClintic & Proctor judgment was void as to plaintiff, because the District Court of Limestone County, Texas, never acquired jurisdiction over him nor the property in question.

That the judgment was not obtained nor was the sale of the land made and obtained by due process of law, but was in contravention of the Fourteenth Amendment to the Constitution of the United States.

That service of process on him in the McClintic & Proctor suit was obtained without the jurisdictional limits of the State of Texas, to wit, in the county of Rockingham and State of Virginia.

That no writ of attachment or other writ was levied on the land.

Third. That the proceedings in the McClintic & Proctor

suit prior to the judgment and the allegations in the petition were ineffectual to confer jurisdiction on the District Court of Limestone County over either the person of plaintiff or the land.

Fourth. That the time given him in which to answer the suit of McClintic & Proctor before the actual rendition of their judgment was not reasonable notice, nor such due and orderly proceedings, under the facts and circumstances as disclosed by the record thereon, as the law requires.

Fifth. That the lien attempted to be enforced in the McClintic & Proctor suit was an equitable lien, created by operation of law, and there has been no legislation in Texas authorizing such suit.

Upon an agreed statement of facts, substantially as above, judgment was rendered by default in favor of plaintiff against the Hollys for $1722.66, but the court refused to enforce the vendor's lien against the land, and gave judgment against plaintiff and in favor of Williams, Jackson and Peoples for costs. Plaintiff appealed to the Court of Civil Appeals, which affirmed the decree of the District Court. 13 Tex. Civ. App. 636. Plaintiff thereupon applied to the Supreme Court of the State for a writ of error, which that court refused; whereupon he sued a writ of error from this court.

Mr. W. S. Laidley and *Mr. John E. Roller* for plaintiff in error.

Mr. W. T. Jackson, *Mr. H. W. Williams* and *Mr. J. Peeples* for defendants in error.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Briefly stated, the case is this: Roller, the plaintiff, who was a resident of Virginia, bought this land in January, 1887, gave a note in part payment for $216.17, which passed into the hands of McClintic & Proctor, who brought suit thereon for a personal judgment against the plaintiff, and for the fore-

closure of a vendor's lien upon the land; served plaintiff with notice of the suit in Virginia, December 30, 1890, to appear in Texas January 5, 1891, and took judgment against him by default January 9, 1891, for $276.65, and for a foreclosure of the lien. Upon a sale in pursuance of this foreclosure, March 3, 1891, the land was struck off to Williams and Jackson, and by them sold to Peoples.

Meantime, however, and on January 1, 1890, a year before the McClintic & Proctor suit was begun, plaintiff sold the land to the Hollys, who went into possession, and took from them five notes of $228 each, and also reserved a vendor's lien, which he sought to foreclose in this suit. Williams, Jackson and Peoples, who purchased the land under the sheriff's sale in the McClintic & Proctor suit, were made parties defendant, and now aver that the plaintiff's title passed to them, which plaintiff denies upon the ground that no process was served upon him within the State of Texas, or within a reasonable time before he was required to appear and answer.

The question in dispute, then, is whether a notice served upon the plaintiff in Rockingham County, Virginia, December 30, 1890, to appear in Limestone County, Texas, on January 5, 1891, to answer the foreclosure suit is due process of law within the meaning of the Fourteenth Amendment? The Hollys, who bought this land and went into possession a year before the McClintic & Proctor suit was begun, were not made parties to that suit, probably because the deed from the plaintiff to them was not on record in Limestone County at the time of the institution of the suit, and their rights are not involved here. It is conceded that the McClintic & Proctor judgment is invalid as a personal judgment against the plaintiff under the case of *Pennoyer* v. *Neff*, 95 U. S. 714, 723, and other cases in Texas of the same import.

1. The position of the plaintiff that, as there was no statute in Texas authorizing a suit against a non-resident to enforce an equitable lien for purchase money, and as there had been no seizure *in rem* of the lands, nor any notice to Roller's vendees, the Hollys, who were in possession, the jurisdiction of the Texas courts could not attach, and the whole proceeding was void, is unsound.

In the case of *Hart* v. *Sansom*, 110 U. S. 151, relied upon in support of this contention, an action of ejectment was brought against several defendants, who set up in defence a judgment against the plaintiff as one having some pretended claim or title to the lands, and other defendants holding recorded deeds thereof, which were averred to be fraudulent and void. Plaintiffs in that suit averred that these pretended deeds and claims cast a cloud upon their title; and that one of the defendants had ejected them from the lands and withheld possession from the plaintiffs. Due service was made on the other defendants, and a citation to Hart, who was a citizen of another State, was published as directed by the local statutes. All the defendants were defaulted, and upon a writ of inquiry the jury found that Hart claimed the land, but had no title by record or otherwise, and returned a verdict for the plaintiffs upon which judgment was entered for a recovery of the land, the cancellation of the deeds and the removal of the cloud upon the title. It was held that this judgment was no bar to an action by Hart in the Circuit Court of the United States, to recover the land against Sansom, who held under a lease from the plaintiffs in the former suit. We held that none of that judgment was applicable to Hart, since that part which was for recovery of possession could not apply to him, as he was not in possession; and that part which was for the cancellation of the deeds set up in the petition, was a decree *in personam* merely, and could only be supported against a non-resident of the State by actual service upon him within the jurisdiction of the State, and that constructive service by publication was not sufficient. Neither of the plaintiffs, however, was in possession of the land or claimed a lien thereon.

In *Arndt* v. *Griggs*, 134 U. S. 316, it was held directly that a State may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which a non-resident defendant is brought into court by publication. It appeared in that case that a suit had been begun by a party alleging that he was the owner and *in possession of* the land in controversy, by virtue of certain tax deeds, against defendants claiming to have some title or interest in

the lands by patent from the United States, which title, as was alleged, was divested by the tax deeds, and was unjust, inequitable and a cloud upon plaintiff's title, and that the suit was brought for the purpose of quieting such title. The defendants were brought in by publication, and a decree entered in favor of plaintiff quieting his title. The question was whether that decree was a bar to an action in ejectment between the grantees of the respective parties to the proceedings to quiet title. In other words, as put by the court: "Has a State the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court only by publication?" The question was answered in the affirmative. In delivering the opinion of the court Mr. Justice Brewer observed: "The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, what jurisdiction has a State over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a State has no power to bring a non-resident into its courts for any purpose by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits — its process goes not out beyond its borders — but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable method of imparting notice. . . . Mortgage liens, mechanics' liens,

material-men's liens and other liens are foreclosed against non-resident defendants upon service by publication only. Lands of non-resident defendants are attached and sold to pay their debts; and indeed, almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication."

This case is readily distinguishable from that of *Hart* v. *Sansom* in the important fact that the plaintiffs in the judgment set up as a defence in that case were *out of* possession while the defendants were *in* possession, and the action was really in ejectment with a somewhat superfluous prayer for the cancellation of all the deeds under which the defendants claimed title. In *Arndt* v. *Griggs* the plaintiffs were in possession, under tax deeds it is true, but having a *prima facie* valid title which they sought to vindicate against the former owners.

The substance of these cases is that if the plaintiff be in possession, or have a lien upon land within a certain State, he may institute proceedings against non-residents to foreclose such lien or to remove a cloud from his title to the land, and may call them in by personal service outside of the jurisdiction of the court, or by publication, if this method be sanctioned by the local law.

In suits for the foreclosure of a mortgage or other lien upon such property, no preliminary seizure is necessary to give the court jurisdiction. The cases in which it has been held that a seizure or its equivalent, an attachment or execution upon the property, is necessary to give jurisdiction are those where a general creditor seeks to establish and foreclose a lien thereby acquired. Of this class *Cooper* v. *Reynolds*, 10 Wall. 308, is the most prominent example. In that case a plaintiff in an action for false imprisonment had attached the property of Reynolds in certain lands, which were sold upon execution to Cooper, who was put in possession by the sheriff. Reynolds, the original owner, brought ejectment against him, and it was held by this court that Reynolds' title to

the land had been divested by the attachment proceedings, upon the ground that, in this class of cases, the levy of the attachment gave the court jurisdiction. But the object of such attachment is merely to give a lien upon the property which the courts may enforce; and if a lien already exists, whether by mortgage, statute or contract, the court may proceed to enforce the same precisely as though the property had been seized upon attachment or execution.

It is true there is no statute of Texas specially authorizing a suit against a non-resident to enforce an equitable lien for purchase money, but article 1230 of the Code of Texas, hereinafter cited, contains a general provision for the institution of suits against absent and non-resident defendants, and lays down a method of procedure applicable to all such cases. Obviously this article has no application to suits *in personam*, as was held by the Supreme Court of Texas in *York* v. *State*, 73 Texas, 651; *Kimmarle* v. *Houston & Texas Central Railway*, 76 Texas, 686; *Maddox* v. *Craig*, 80 Texas, 600; and by this court in *Pennoyer* v. *Neff*, 95 U. S. 714, 723. The article must then be restricted to actions *in rem;* but to what class of actions, since none is mentioned specially in the article? We are bound to give it some effect. We cannot treat it as wholly nugatory, and as it is impossible to say that it contemplates a procedure in one class of cases and not in another, we think the only reasonable construction is to hold that it applies to all cases where, under recognized principles of law, suits may be instituted against non-resident defendants. In the case of *Hollingsworth* v. *Barbour*, 4 Pet. 466, relied upon by the plaintiff, a statute of Kentucky authorized suits in chancery against non-residents "where any person or persons, their heirs or assigns, claim land as locator, or by bond or instrument in writing;" and as the plaintiff in the case did not claim as locator, it was held that the court acted without authority, and that the decree was void for want of jurisdiction. Where the statute specifies certain classes of cases which may be brought against non-residents, such specification doubtless operates as a restriction and limitation upon the power of the court; but where, as in article 1230 of the

Texas Code, the power is a general one, we know of no principle upon which we can say that it applies to one class of cases and not to another. Unless we are to hold it to be wholly inoperative, it would seem that suits to foreclose mortgages or other liens were obviously within its contemplation. In any event, this was the construction given to it by the Court of Civil Appeals, and apparently by the Supreme Court of the State, and is obligatory upon this court as a construction of a state statute. *Battle* v. *Carter*, 44 Texas, 485; *Oswald* v. *Kaufmann*, 28 Fed. Rep. 36, a Texas case; *Martin* v. *Pond*, 30 Fed. Rep. 15.

2. We are therefore remitted to the principal question in dispute between these parties, namely, the sufficiency of the notice given to the plaintiff of the McClintic & Proctor suit. In this connection our attention is called to certain articles of the Texas Code, the first one of which, Art. 1228, Sayles' Texas Civil Statutes, provides generally for the service of process by giving five days' notice, exclusive of the day of service and of the return day. In addition to this there are the following sections:

Art. 1230. "Where the defendant is absent from the State, or is a non-resident of the State, the clerk shall, upon the application of any party to the suit, his agent or attorney, address a notice to the defendant requiring him to appear and answer the plaintiff's petition at the time and place of holding of the court, naming such time and place. Its style shall be 'The State of Texas,' and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties, and the nature of the plaintiff's demand, and shall state that a copy of the plaintiff's petition accompanies the notice. It shall be dated and signed and attested by the clerk, with the seal of the court impressed thereon; and the date of its issuance shall be noted thereon; a certified copy of the plaintiff's petition shall accompany the notice."

Art. 1234. "Where a defendant has been served with such notice he shall be required to appear and answer in the same manner, and under the same penalties as if he had been personally served with a citation within this State."

Art. 1280. ". . . The fifth day of each term of the district court and the third day of each term of the county court are termed appearance days."

Art. 1281. "It shall be the duty of the court on appearance day of each term, or as soon thereafter as may be practicable, to call in their order all cases on the docket which are returnable in such term."

Art. 1340. "Judgments for the foreclosure of mortgages and other liens shall be, that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and (except in judgments against executors, administrators and guardians) that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions."

From these requirements it appears that the time for service of process in the courts of Texas was five days, exclusive of the day of service and return, and that there is no distinction in this particular between defendants living in the town where the court is sitting and defendants living in other States, or even in a foreign country. In short, for aught that appears here, parties may be called from the uttermost parts of the earth to come to Texas and defend suits against them within five days from the day the notice is served upon them. In the case under consideration it is admitted that the defendant was served with notice on December 30, 1890, at Harrisonburg, Rockingham County, Virginia, to appear on January 5, 1891, at Groesbeck, Limestone County, Texas; that it would have required four days of constant travelling to reach Groesbeck, giving the plaintiff but one day, and that a Sunday, to make preparations to comply with the exigencies of the notice. This estimate, too, makes no allowance for accidental delays in transit. It is true that, by articles 1280 and 1281, the case could not have been called for trial or default until the fifth day

of the term, January 9, and that Roller's default was not actually taken and judgment entered until that day. But, as a citizen of Virginia, he was not bound to know the practice of the Texas courts in that particular, and was at liberty, even if he were not compelled, to construe the notice as it read upon its face. Very probably, too, the court which rendered the judgment would have set the same aside, and permitted him to come in and defend; but that would be a matter of discretion — a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.

That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701–712. What shall be deemed a reasonable notice admits of considerable doubt. In the case of a witness subpœna the command of the writ is that the party served shall lay aside all his business and excuses, and make his way to the court with the utmost dispatch, or at least present himself upon the return day of the writ. An ordinary summons, however, to answer the suit of a private individual contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel and the preparation of his defence.

In 2 Chitty's General Practice, 175, it is said in reference to summary proceedings before justices of the peace: "The time appointed must always allow sufficient opportunity between the service of the summons and the time of appearance, to enable the party to prepare his defence and for his journey; and the justice should in this respect take care to avoid any supposition of improper hurry, or he may incur the censure of the Court of King's Bench, if not be subject to a criminal information.

The precise time will generally depend on distance, and the other circumstances of each particular case. With analogy to other branches of the law, a man should not be required, *omissis omnibus aliis negotiis*, instantly to answer a charge of a supposed offence necessarily less than an indictable misdemeanor, on the same or even the next day, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence; and even the convenience of witnesses should be considered; and therefore, in general, several days should intervene between the time of summons and hearing. In the superior courts, in general, at least eight days' notice of inquiry and of trial are essential for the preparation of the defence." In vol. 2, page 144, it is said that the ancient practice was that a person residing at a considerable distance from a metropolis should be allowed more time for performing the act than a person within, or near, the metropolis, but that there is now no distinction between an arrest on process in London or Yorkshire, and in each case the defendant must appear or put in bail within eight days after the date of service or arrest. This, considering the small area of the kingdom, and the rapid means of transportation, seems just and reasonable.

While, as before stated, there is but little in the way of judicial authority upon the question, in the statutes of the several States regulating proceedings against absent and non-resident defendants, there is a consensus of opinion, which is entitled to great weight in passing upon the question of the reasonableness of such notice.

In the act of Congress providing for the enforcement of liens upon property as against non-residents, Rev. Stat. § 738, the court is required to make an order fixing a day certain, which shall be served on the absent defendant wherever found, or, if personal service be impracticable, such order shall be published once a week for six consecutive weeks, with a proviso that, if there be no personal service, he shall have one year after final judgment to enter his appearance, and set aside the judgment. The same proviso allowing the court to fix the time of appearance is found in the statutes of Massachusetts, New Hampshire, Pennsylvania, Alabama, Maryland and Virginia.

By the sixth rule of this court, a party moving to dismiss must give a notice of at least three weeks, and where counsel to be notified reside west of the Rocky Mountains, a notice of at least thirty days.

By the Code of Civil Procedure of New York, sec. 440, the judge is required to make an order for publication once a week for six successive weeks, and in addition thereto the plaintiff, on or before the day of the first publication, is bound to mail a copy of the summons, complaint and order for appearance to the non-resident defendant. By sec. 2525, citations from Surrogate's Courts must be served on non-residents at least thirty days before the return day.

By the General Statutes of Vermont, (1894) §§ 1641, 1643, non-resident defendants (served out of the State) are entitled to at least twenty days' notice before the time when they are required to appear.

By the practice in Michigan, the court orders the absent or non-resident defendant to appear in not less than three months, if he be a resident of the State, absent or concealed, and if a resident of some other of the United States or of the British provinces, in not less than four months; and if a resident of any foreign State, in not less than five months from the date of making the order; and if the order be not published for six successive weeks, defendant shall be personally served at least twenty days before the time prescribed for his appearance. 2 Howell's Statutes, §§ 6670, 6671 and 6672.

By the Revised Statutes of Illinois, (1899) chapter 22, § 14, there must be either publication or a personal service upon the non-resident defendant, "not less than thirty days previous to the commencement of the term at which such defendant is required to appear."

By the General Statutes of New Jersey, (1895) Vol. 1, page 405, the chancellor may order the non-resident defendant to appear not less than one nor more than three months from the date of the order; "of which order such notice as the chancellor shall by rule direct shall, within ten days thereafter, be served personally on such defendant," or be published for four weeks. This gives the defendant at least twenty days' personal notice.

By the General Statutes of Arkansas, (1894) §§ 5677, 5678, a non-resident defendant is entitled to a copy of the complaint and the summons warning him to appear and answer "within sixty days after the same shall have been served on him."

By the Code of Georgia, (1895) § 4979, the party obtaining an order for the appearance of a non-resident defendant shall file in the office of the clerk, at least thirty days before the term next after the order for publication, a copy of the newspaper in which said notice is published, which the clerk is required to at once mail to the party named in the order; and, by sec. 4980, the judge is required to determine whether the service has been properly perfected.

By the Revised Statutes of Florida, (1892) § 1413, the clerk must publish the order for the appearance of a non-resident defendant once a week for four consecutive weeks, and also, within twenty days after the making of the order, mail a copy to the defendant, if his residence be shown by the bill or affidavit.

By the Code of Montana, (1895) § 638, publication must be made for four successive weeks, and, where the residence of the defendant is known, the clerk must forthwith deposit a copy of the summons and complaint in the post office, directed to the person to be served at his place of residence. A similar practice also obtains in California.

By the General Statutes of Mississippi, (1892) sec. 3423, publication may be dispensed with, if the summons be served upon the absent party at least ten days before the return day. This is the shortest length of notice to be found in any of the statutes.

By the Code of Oregon, (1892) sec. 57, in case of publication, which must be not less than once a week for six weeks, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, addressed to the defendant, if his place of residence be known; and "in case of personal service out of the State, the summons shall specify the time prescribed in the order for publication."

It may be said in general, with reference to these statutes, that in cases of publication notice is required to be given at

least once a week for from four to eight weeks, and in case of personal service out of the State, no notice for less than twenty days between the service and return day is contemplated in any of the States except Mississippi, where a personal notice of ten days seems to be sufficient. While, of course, these statutes are not obligatory here, they are entitled to consideration as expressive of the general sentiment of legislative bodies upon the question of reasonableness of notice.

Without undertaking to determine what is a reasonable notice to non-residents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, that five days was not a reasonable notice, or due process of law; that the judgment obtained upon such notice was not binding upon the defendant Roller, and constitutes no bar to the prosecution of this action.

The judgment of the Court of Civil Appeals, affirming the judgment of the District Court of Limestone County, must therefore be reversed, with instructions to remand the case to that court for further proceedings not inconsistent with this opinion.

THE CHIEF JUSTICE and MR. JUSTICE BREWER dissented.